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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION; ROBERT N. HUNTER, CHIEF ENGINEER OF THE MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION and V.B. UNSELL, DISTRICT ENGINEER FOR DISTRICT 8 OF THE MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION,

Petitioners,

v.

JANE CATLETT, PATRICIA LEEMBRUGGEN, GRACE TUTER and ADELINE KALLEMYN, Individually and on behalf of all others similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in interpreting this Court's decision in *Connecticut* v. *Teal* as prohibiting use of "bottom line" statistics, showing that female applicants were more likely to be hired than males, as a defense to a Title VII class-based, as opposed to individual, claim of disparate treatment in hiring.

2. Whether, in a sex discrimination case involving a nontraditional job category, the court of appeals impermissibly shifted to the employer the burden to produce "direct evidence" that potential applicants lacked interest, or qualifications, rather than permit the employer to defend its hiring practices on the basis of refined labor pool statistics that take into account applicants' interests and qualifications.

LIST OF PARTIES

The caption of the case contains the names of all parties.

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The Missouri Highway and Transportation Commission, Robert N. Hunter, Chief Engineer of the Missouri Highway and Transportation Commission, and V.B. Unsell, District Engineer for District 8 of the Missouri Highway and Transportation Commission hereby petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the district court with respect to the liability issues (App., *infra*, 26a-64a) is reported at 589 F. Supp. 929 (W.D. Mo. 1983). The opinion of the district court with respect to remedial issues (App., *infra*, 72a-87a) is reported at 627 F. Supp. 1015 (W.D. Mo. 1985) and the opinion of the district court apportioning back pay awards to the individual plaintiffs and class members (App., *infra*, 65a-71a) is reported at 643 F. Supp. 321 (W.D. Mo. 1986). The opinion of the court of appeals (App., *infra*, 1a-25a) is reported at 828 F.2d 1260 (8th Cir. 1987).

JURISDICTION

The judgment of the court of appeals was entered on September 9, 1987 and a petition for rehearing was denied on October 23, 1987. On January 7, 1988, Justice Blackmun extended the time for filing this petition to and including February 22, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution (U.S. Const. amend XIV, § 1) provides, in pertinent part:

> [N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .

Section 703(a) of Title VII of the Civil Rights Act of 1964 provides in pertinent part:

> It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-2(a).

Section 703(j) of Title VII also provides in relevant part:

> Nothing contained in this subchapter shall be interpreted to require any employer . . . subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex or national origin of such individual or group on account of an imbalance which may exist with respect to the total number of percentage of persons of any race, color, religion, sex, or national origin employed by any employer . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

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STATEMENT

1. This case involving claims of sex discrimination in violation of Title VII, 42 U.S.C. §§ 2000e *et seq.*, and Section 1983, 42 U.S.C. § 1983, was filed on behalf of both individual female plaintiffs and on behalf of a class composed of "females who applied or might have applied for maintenance positions in District Eight [of the Missouri Highway and Transportation Commission] between January 1, 1975 and May 31, 1980." App., *infra*, 5a. The

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requirements for the positions in question were an "eighth grade education and an ability to operate lightweight motor equipment, and duties include mowing highway right of ways, plowing snow, filling potholes, maintaining rest areas, and performing minor service and repairs on equipment." App., *infra*, 4a.

The Section 1983 claims were tried to a jury and the Title VII claims were tried before the district court. The jury returned a verdict for the defendants on the individual Section 1983 claims, but the district court reached a contrary conclusion concerning Title VII, holding for the individual plaintiffs on that count. App. *infra*, 5a-6a.

The district court found in favor of the class on both the disparate impact and disparate treatment theories of Title VII.[1] First, the court found that Missouri's "word-of-mouth" recruiting system was a facially neutral procedure that had a disproportionate effect on the number of women who applied, as opposed to those who might have applied, for maintenance jobs. App., *infra*, 59a-60a The court thus concluded that the word-of-mouth recruiting system had a disparate impact on the class of potential applicants. *Id.*

Second, with respect to the claim of intentional discrimination against actual women applicants ("disparate treatment"), the district court found that the "statistical evidence presented . . . clearly establishes a prima facie case of employment discrimination." App., *infra*,

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[1] On the Section 1983 claim on behalf of the class, the jury also returned a verdict for the plaintiffs. App., *infra*, 6a. As the court of appeals recognized, the analysis of a Section 1983 employment claim follows Title VII disparate treatment analysis. App., *infra*, 9a. Therefore, if the court of appeals' decision were reversed because of the lower court's inappropriate use of statistical analysis, the jury verdict—which was based on identical evidence—also would have to be reversed. Accordingly, like the court of appeals' opinion, this petition is limited to the Title VII issues.

51a. That statistical evidence consisted essentially of a comparison between the percentage of women in the civilian labor force, which the court defined as the "potential" work force, and the percentage of women hired by petitioners.

In making this statistical comparison, the district court adopted a "moderate" definition of the potential labor force, which included female residents in District Eight employed "in the job categories of sales, blue collar, farm, service and clerical" positions. App., *infra*, 30a-31a. Based on this definition, the court found that the percentage of women in the relevant labor pool was 48 percent. App., *infra*, 31a; see also App., *infra*, 77a-78a. The court also considered a "conservative" definition of the potential labor force consisting of all female residents of the relevant counties in all job categories—except managerial, technical, professional and clerical workers —who were between 18 and 70 years of age and had a driver's license and an eighth grade education. App., *infra*, 30a-31a. As applied, both of these definitions of the potential labor pool are virtually indistinguishable from general population statistics.

The district court acknowledged that petitioners' "bottom line" statistics demonstrated that female applicants had a slightly better chance (2.6 percent) of being hired than male applicants (2.5 percent). Nevertheless, the court based its finding of class-wide intentional discrimination on the disparity between the number of women represented in the general population and the number in petitioners' workforce.[2] It reached this conclusion despite the absence of any disparity reflected in petitioners' hiring from the actual applicant pool. App., *infra*, 51a-52a.

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[2] Limited "anecdotal" evidence was presented by the class to support its statistical proof. The anecdotal evidence consisted of the testimony of the four named plaintiffs and twelve other individuals. The jury found that the named plaintiffs were *not* discriminated against. See App., *infra*, 40a-42a (discussing anecdotal evidence). The Eighth Circuit did not find the few instances of dis-

2. The court of appeals reversed the district court's holding in favor of the individual plaintiffs, but affirmed the finding of intentional discrimination against the class, solely on the basis of disparate treatment in hiring. With respect to that claim, the court of appeals relied primarily on evidence that "females constituted up to forty-eight percent [3] of the relevant work force, compared to less than ten percent of Missouri's maintenance hires during the class period." [4] App., *infra*, 12a. The

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crimination to be sufficient to support an inference of intentional discrimination against the class.

In order to assess properly the impact of the anecdotal evidence on class-wide claims, "[t]he court must focus on the ratio of the number of instances proved to the size of the class," *Metrocare* v. *Washington Metropolitan Area Transit Authority*, 679 F.2d 922, 930 (D.C. Cir. 1982). A "small percentage [6 cases out of 400 class members] does not tend to show class-wide discrimination." *Id.* at 929-930. This case is like *Valentino* v. *United States Postal Service*, 674 F.2d 56, 73 (D.C. Cir. 1982) where "the combination of unrefined statistics and thin proof of individual instances of discrimination leaves the adjudicator without any basis for concluding that gender impeded [respondents] and the class [they] would represent . . . ."

[3] The 48 percent statistic offered by the court of appeals as the relevant percentage of women in the "work force" is based on the district court's finding that, in 1980, the "percentage[] of women in the relevant labor pool under the moderate definition" was 48 percent. App., *infra*, 30a-33a. This was the highest percentage of women in the "relevant" work force in any year under either the moderate or conservative definition introduced by plaintiffs. *Id.*

[4] Petitioners' more refined labor pool (based upon 28 similar jobs in the labor force in district 8 which utilize skills required by maintenance workers) showed the percentage of women employed in similar job categories ranged from 3.4 percent in 1970 to 7.1 percent in 1980 (D. Exs. 37 and 38). The number of women registering for referral through the Missouri Division of Employment Security in the 28 similar job groupings in 1980 was 2.5 percent. *Id.* Moreover, only 8 percent of employment applications received by petitioners for maintenance work (312 out of 3878) were from women. App., *infra*, 12a.

court recognized that the discrepancy between the percentage of women hired in maintenance positions and the percentage of women in the general work force could be attributed to factors such as interest in, or qualifications for, the positions in question. However, the court held that once a "discrepancy" was established, "Missouri bore the burden of introducing [direct] evidence to show" that the discrepancy was based on a "significant" nondiscriminatory factor.[5] *Id.*

With respect to petitioners' "bottom line" statistics, which demonstrated that female applicants had a slightly better chance of being hired than male applicants, the court, relying upon *Connecticut* v. *Teal*, 457 U.S. 440 (1982), held that such evidence was insufficient to rebut the class' prima facie case because "[v]ictims of a discriminatory policy cannot be told they have not been wronged because other females have been hired." App., *infra*, 12a. According to the court of appeals, the jury was free to "weigh" without specific guidance the differing inferences arising from the "discrepancy" between petitioners' hiring and the general work force statistics and the lack of discrepancy between petitioners' hiring and other, more refined, comparisons, including selection from the actual applicant pool.[6] App., *infra*, 13a.

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[5] The court stated that petitioners had failed to produce "direct evidence" to "demonstrat[e] a lesser interest in highway maintenance work on the part of females accounted for the disparity" between the percentage of females holding maintenance positions and the percentage of females in the general workforce. App., *infra*, 12a. Petitioners had in fact introduced substantial statistical evidence of lack of interest—including evidence that the percentage of women employed by petitioners compared favorably with the percentage of women in 28 similar positions, and evidence of the low level of interest of unemployed women in maintenance jobs based on records maintained by the Missouri Division of Employment Security. See *supra* note 4.

[6] Utilizing the "expected" level of women applicants derived from the percentage of women in the civilian labor force, the district

REASONS FOR GRANTING THE PETITION

The Eighth Circuit has decided issues of recurring and fundamental importance in the trial of class action disparate treatment cases under Title VII in a way that expands the potential liability of employers far beyond Congress' intent, as established in prior holdings of this Court. Review of the holding below is warranted to clarify the law concerning the proper use of burdens of proof and statistical evidence of disparate treatment in claims alleging intentional class-wide gender discrimination in violation of Title VII.

Under the decision below, if a Title VII class action plaintiff is able to demonstrate that an employer does not hire or maintain a work force that mirrors the representation of women in the population,[7] the burden shifts to the employer to demonstrate, by "direct evidence," that such a "disparity" is the result of a lack of qualifications or interest, or both, on the part of female members of the class. The court's requirement that the employer produce "direct" evidence of lack of interest or qualifications strongly suggests that statistical evidence demonstrating lack of interest—a traditional method of countering plaintiffs' statistical evidence—is inadequate. As a result, once the "inference" is drawn from a comparison of the

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court determined that 46 women (48 percent of 97 openings) should have been hired, whereas the Commission had hired only eight. App., *infra*, 77a-78a. The court therefore awarded retroactive preferential hiring and backpay based on the difference—the 38 expected "female" vacancies. *Id.* The court did not address the question whether the acceptance rate for women who were offered the position would have been the same as that for men.

[7] The court defined the relevant labor force as encompassing virtually all women between the ages of 18 and 70 (except those employed in technical, professional, managerial or clerical positions) in the "conservative" definition. Thus, the definition employed is indistinguishable, as a practical matter, from the general population. See *supra* pages 5-6.

actual hirings to the broad "potential" workforce, an employer in the Eighth Circuit faces an unprecedented and costly burden. In effect, the employer must explain the "discrepancy" either by (1) painstaking proof that individual members of the class lack the necessary qualifications or interest, or (2) a costly survey of the interests and talents of relevant categories of potential employees. This shifting of the evidentiary burden, based on overly broad statistical comparisons which, when analyzed properly, create no inference of classwide discrimination, represents an improper and unwarranted change in Title VII law.

The court of appeals' analysis conflicts with Congress' expressed intent that Title VII not "be interpreted to require any employer . . . to grant preferential treatment to an individual or to any group . . . on account of an imbalance which may exist" between the representation of any group in the employer's workforce and the representation of that group in the "available work force in any community . . . ." 42 U.S.C. § 2000e-2(j). Moreover, the court of appeals' reasoning is particularly inappropriate in a case involving a nontraditional job category in which women historically have been underrepresented. In its use of "general" work force or population statistics to shift the burden of proof to the employer, the opinion below conflicts with the teachings of this Court in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), and *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977), concerning the proper use of general population data versus data that is refined to take account of interests and qualifications.[8]

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[8] "The *Hazelwood* rule requires that the relevant labor pool be tailored to eliminate those whose exclusion from the position in issue could be attributed to want of the requisite skills." *Rivera* v. *City of Wichita Falls*, 665 F.2d 531, 540 (5th Cir. 1982); see *Segar* v. *Smith*, 738 F.2d 1249, 1274 (D.C. Cir. 1984), *cert. denied*, 471

In addition to its distortion of the use of statistical evidence and the burden of proof, the Eighth Circuit has improperly eliminated the employer's ability to establish a statistical defense to classwide claims of disparate treatment. In *Connecticut* v. *Teal*, 457 U.S. 440 (1982), a sharply divided Court held that a "bottom line" defense, which demonstrates that members of a protected class were treated more favorably than non-members, is not a defense to an *individual* claim of disparate impact by a member of that protected class. The rejection of that defense in the instant case—in which the inference of *classwide* disparate treatment is at issue—represents a significant and erroneous expansion of the *Teal* doctrine which warrants review by this Court.

I. The Holding Below Raises An Important Issue of Federal Law Which Was Left Unresolved By *Connecticut* v. *Teal* And Which Should Be Decided By This Court.

A. In *Connecticut* v. *Teal*, 457 U.S. 440 (1982), this Court addressed the issue whether an "employer's acts of discrimination" against individual employees in the promotion process "would not render the employer liable for the racial discrimination suffered by employees barred from promotion if the 'bottom line' result of the promotional process was an appropriate racial balance." 457 U.S. at 442. The Court held that the " 'bottom line' does not preclude . . . [individual] employees from establishing a prima facie case, nor does it provide [the] employer with a defense to such a case." *Id.*

U.S. 1115 (1985) ("A plaintiff's statistical evidence must therefore focus on eliminating this nondiscriminatory explanation [lack of qualifications] by showing disparities in treatment between individuals with comparable qualifications for the position at issue"); *Piva* v. *Xerox Corp.*, 654 F.2d 591, 596 (9th Cir. 1981) ("The disparity between the percentage of female Western Region salespersons and the percentage of women in the general work force is statistically significant. The probative value of this disparity in proving discrimination, however, depends in large part upon whether special qualifications are required to do the job").

In *Teal*, four individual black employees of the State of Connecticut brought a disparate impact case challenging the State's use of a written examination as the "first step" in a multistep promotion process. The evidence demonstrated that of the 259 white candidates, 206 (79 percent) passed the "first step" examination. Out of 48 black candidates, only 26 (54 percent) passed the examination. However, the "bottom line" analysis demonstrated that when the promotion process was viewed as a whole, 30 percent of the 48 black candidates were promoted (a total of 11), while only 13 percent of the 259 white candidates were promoted. The plaintiffs in *Teal*, individual black employees who failed to pass the "barrier" of the written examination, argued that, absent a demonstration that the examination has "a manifest relationship to the employment in question," the use of the written examination would establish a prima facie case of discrimination under Section 703(a)(2) of Title VII because of its disparate impact on black employees.

This Court agreed with the individual plaintiffs that a "claim of disparate impact from the examination, a pass-fail barrier to employment opportunity, state[d] a prima facie case of employment discrimination. . . ." 457 U.S. at 452. Once the prima facie case had been established, the Court then addressed the issue whether the "bottom line" proof that blacks, as a class, fared better than whites under the promotional system in question would constitute a defense to the individual plaintiffs' prima facie disparate impact case.

The Court determined that the "principal focus" of Title VII is the "protection of the individual employee." Thus, while a nondiscriminatory bottom line might help rebut an inference of class-wide discriminatory intent, it would not "immunize an employer from liability for specific acts of discrimination." *Id.* at 454 (quoting *Furnco Construction Corp* v. *Waters*, 438 U.S. 567, 579 (1978)). "Title VII does not permit the victim of a facially dis-

criminatory policy to be told that he has not been wronged because other persons of his or her race or sex were [promoted]." *Id.* at 455.

B. The instant case raises the important issue, left undecided in *Teal*, whether the "bottom line" defense is an "answer" to a claim of classwide—as opposed to individual—discrimination. With respect to respondents' claim of disparate treatment against the class—the only claim the court of appeals reviewed—petitioners demonstrated that female applicants were slightly more likely than male applicants to be selected for the positions in question. The Eighth Circuit nevertheless held, solely on the basis of *Teal*, that proof that applicants were treated equally at the bottom line was no defense to a claim that the class of applicants and non-applicants (considered together) were subject to disparate treatment. App., *infra*, 12a-13a.

If this holding is permitted to stand, it will have a substantial impact on Title VII litigation. The rejection of a defense based on actual hiring statistics (*i.e.*, equal treatment of applicants) in a case alleging *classwide* discrimination in hiring completely blurs the distinction between classwide and individual claims of discrimination. Moreover, if the "bottom line" defense is held inapplicable to classwide—as well as individual—claims, the only statistical defense available to an employer will be that his hiring mirrors gender representation in the community.

Even an employer who had engaged in a bona fide affirmative action program would have no defense against a classwide Title VII claim if it had failed to attract women into nontraditional job categories in numbers reflecting their presence in the general workforce. The logical extension of the Eighth Circuit's decision is that all fire departments, police departments and highway maintenance crews that are not composed of 48 percent

women may be held to be in violation of Title VII (absent "direct evidence" of lack of interest or qualifications on the part of women), despite the recognized historical underrepresentation of women in these job categories. Such a conclusion is inconsistent with both the express language of Section 703(j) and with the prior decisions of this Court. See *Hazelwood School District* v. *United States*, 433 U.S. 299, 313 (1977); *New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 585-87 (1979).

The Eighth Circuit, in its rejection of the "bottom line" defense in this case, has allowed the mixed class of applicants and non-applicants to use the "disparity" in the number of female applicants to "bootstrap" its argument that the employer engaged in intentional discrimination in its selection of employees. Such a process has been condemned by other courts as permitting the employee "to select the group, large or small, that most convincingly supports his claims." *Sengupta* v. *Morrison-Knudsen Co., Inc.*, 804 F.2d 1072, 1077 (9th Cir. 1986) (finding no disparate impact where "equal percentage of minority and non-minority employees being laid off" throughout company, despite showing of "disparity" in certain subgroups of employees). The court of appeals' extension of *Teal* to achieve this result justifies review by this Court.

II. The Holding Below Raises The Important Question Whether A Statistical Disparity Between The Percentage Of Women In An Employer's Work Force And The Percentage Of Women In The General Population Is Sufficient To Shift The Burden To The Employer To Prove Directly That Disparity Results From Lack Of Interest Or Qualifications.

Presentation and rebuttal of statistical evidence is at the very core of class action disparate treatment and adverse impact litigation under Title VII. *See generally* B. Schlie & P. Grossman, *Employment Discrimination Law* 1331 (2d ed. 1983). Since this Court's decision in *Griggs*

v. *Duke Power Co.*, 401 U.S. 424 (1971), the use of statistical evidence in proof and rebuttal has been gradually refined, and this Court has articulated two distinct orders and methods of proof under the disparate treatment and disparate impact theories.[9] Nevertheless, the appropriate use of statistical comparisons in class action disparate treatment and disparate impact cases has remained a difficult task for the lower courts. B. Schlie & P. Grossman, *supra*, at 1286-1290; 1331-1391. In no category of cases has the task of utilizing statistical comparisons been more difficult than in class action cases alleging sexual discrimination in hiring for jobs in which women traditionally have been underrepresented.

A. In *Teamsters* v. *United States*, 431 U.S. 324 (1977), the Court held that a long-lasting and gross statistical disparity between the racial composition of an employer's work force (in a low-skilled or semi-skilled job) and that of the general population, coupled with anecdotal evidence of individual instances of discrimination, may constitute prima facie proof of a pattern or practice of race discrimination under Title VII. 431 U.S. at 338-42.[10] The Court, however, recognized the considerable dangers inherent in drawing inferences of intentional discrimination from disparities based on unrefined general population or work force statistics. *Id.* at 340. The Court emphasized that where a plaintiff relies upon such unrefined statistics, the defendant must have an op-

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[9] The *Griggs* holding set forth the proper analysis for claims of disparate impact. The Court articulated the appropriate analysis for claims of disparate treatment in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802-803 (1973) and *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981).

[10] The Court carefully distinguished the disparate treatment theory of discrimination, in which "[p]roof of motive is critical," from the disparate impact theory used in *Griggs*, although it recognized that proof of discriminatory motive "can in some situations be inferred from the mere fact of differences in treatment." 431 U.S. at 335, n.15 (citation omitted).

portunity to respond to the quality of a plaintiff's statistical evidence. 431 U.S. at 339-340.

In response to a prima facie case based on a statistical disparity, a defendant may present evidence to demonstrate: (1) that plaintiff's statistics are incorrect and that there is no disparity; and (2) that any disparity results from such factors as the interest or qualifications of members of the protected class and not from invidious discrimination. In reviewing defendant's case, the district court should first consider the employer's evidence challenging the validity of plaintiff's statistical showing of "disparity" before the employer is required to rebut the inference that the statistical disparity resulted from invidious discrimination.

For example, this Court in *Teamsters* suggested that the validity of a statistical disparity might be undermined by showing that the sample size was too small, or by "evidence showing that the figures for the general population might not accurately reflect the pool of qualified job applicants . . . ." 431 at 340, n.20. The court of appeals, by failing to consider properly petitioners' statistical evidence, deprived petitioners of one of two possible defenses and improperly required them to undertake painstaking and costly proof of the talents and interests of the relevant pool of potential employees.

The reasoning in *Teamsters* was followed in *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977), in which the government brought a disparate treatment case alleging a pattern and practice of racial discrimination in hiring. The government's evidence compared Hazelwood's teacher work force with "undifferentiated work force statistics" (433 U.S. at 306), and bolstered the statistical evidence with proof of a history of alleged discrimination, the school district's subjective hiring procedures,[11] and specific instances of discrimina-

[11] Persons requesting an application were sent one. Selected applicants received interviews, but not all applicants were interviewed

tion against applicants. The Eighth Circuit held that the government's proof was sufficient.

This Court questioned "whether a basic component in the Court of Appeals' finding of a pattern or practice of discrimination—the comparatively small percentage of Negro employees on Hazelwood's teaching staff—was lacking in probative force." 433 U.S. at 307.[12] The Court expressed doubt about the use of unrefined statistical comparisons and admonished the court of appeals because it had "totally disregarded the possibility that the prima facie statistical proof in the record might at the trial court level be rebutted by statistics dealing with Hazelwood's hiring after it became subject to Title VII." *Id.* at 309.[13] The Court reiterated its warning from *Teamsters* that "statistics . . . come in infinite variety," 433 U.S. at 312, and invited the district court on remand

> to determine whether sufficiently reliable applicant-flow data are available to permit consideration of the petitioners' argument that those data may undercut a statistical analysis dependent upon hirings alone.

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or notified of openings. School principals had virtually unlimited discretion in hiring teachers at their schools. 433 U.S. at 301-302.

[12] The petition for certiorari in *Hazelwood* phrased the question as follows:

> "Whether a court may disregard evidence that an employer has treated actual job applicants in a nondiscriminatory manner and rely on undifferentiated workforce statistics to find an unrebutted prima facie case of employment discrimination in violation of Title VII of the Civil Rights Act of 1964."

[13] The Court noted the Eighth Circuit's heavy reliance on comparative work force statistics and the absence of applicant-flow data, showing the actual percentage of white and black applicants. The Court invited the district court to determine whether such data could be deduced on remand, stating, "If so, it would, of course, be very relevant." *Id.* 433 U.S. at 308, n.13 (citation omitted).

433 U.S. at 313, n.21. The Court thus indicated that a comparison of applicants to hires is more probative than the government's unrefined comparison of actual hires to general work force or population statistics.

General population statistics, rather than applicant flow data, have been used by the courts in some disparate *impact* cases to determine if the specific screening standard (*e.g.*, a high school diploma or a minimum height and weight requirement) is possessed equally by the protected group and the nonprotected group. Applicant flow data may not present a full picture on this narrow question of exclusion because the applicant data may be unrepresentative due to self-exclusion by protected class members. *Dothard* v. *Rawlinson*, 433 U.S. 321, 330 (1977).

However, generalized population or work force statistics concerning the percentage of women in the work force have little relation to the class of qualified women who are interested in jobs in which women traditionally have been underemployed ("nontraditional jobs") such as firefighters, police officers or highway maintenance workers.[14] A comparison between the composition of an employer's work force (for a low skilled position) and the general population may be appropriate in a race discrimination case, such as *Teamsters*, because there is no reason to assume that substantial numbers of a particular race would, as a race, have a lack of interest in any

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[14] In a case involving a virtually identical job category, the Third Circuit rejected similar statistical comparisons. *Mazus* v. *Dept. of Trans., Com. of Pa.*, 629 F.2d 870, 875 (3rd Cir. 1980) *cert. denied*, 449 U.S. 1126 (1981) ("[T]he census figures leave much to be desired because we agree with the district court that the category is overbroad, including many types of 'inside' workers such as clerical workers, and a number of unrelated jobs"). The Third Circuit also found such a broad pool "did not accurately reflect the percentage of females *interested* in the work force in question . . . ." *Id.* (emphasis added).

given field of employment. But the same comparison is not appropriate in the context of a sex discrimination case involving a nontraditional semi-skilled job category. See *Equal Employment Opportunity Commission* v. *Sears, Roebuck & Company*, 11 Daily Labor Rep. D11-12 (BNA) (7th Cir. Jan. 19, 1988) (EEOC's use of "over-inclusive" applicant pool, which did not make allowance for the interest, or lack of interest, of potential female applicants, was "one of the most serious flaws pervading all of EEOC's statistical analyses"). See also *Hammon* v. *Barry*, 826 F.2d 73, 85 (Silberman, J., concurring).[15]

B. In a class action disparate treatment case alleging sexual discrimination in hiring, particularly for nontraditional semi-skilled jobs, an employer must be allowed to rebut the plaintiffs' general work force statistics with more refined and more probative statistical comparisons focusing on the pool of qualified and interested candidates.[16] See *Hammon* v. *Barry*, 826 F.2d at 78 (D.C.

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[15] This Court also cautioned against applying statistical arguments outside their appropriate contexts in *New York City Transit Authority* v. *Beazer*, 440 U.S. 568 (1979). In *Beazer*, the Court rejected plaintiff's attempt to establish that a policy against hiring persons on methadone maintenance had an adverse impact on blacks and Hispanics based on unrefined "potential" applicant data. 440 U.S. at 585-586. The Court found that such information "tells us nothing about the class of otherwise-qualified applicants" and "is virtually irrelevant because a substantial portion of the persons included in it are either unqualified for other reasons" (440 U.S. at 585-86) or had already obtained employment elsewhere. *Id.* Indeed, the Court suggested, but did not decide, that such undifferentiated statistical analysis would not even support a prima facie violation of Title VII. *Id.* at 587.

[16] As in this case, a plaintiff class may proceed under both disparate treatment and adverse impact theories, introducing anecdotal evidence alleging individual acts of discrimination to buttress its statistical case. In practice, however, the trial court's determination of the proper base for statistical comparisons is critical in class action cases under Title VII. B. Schlie & P. Grossman, *supra*, at 1331 *et seq.* Without the statistical evidence here, the plaintiffs' case unquestionably would have been insufficient. See *supra* note 2.

Cir. 1987) (declining to "engage in an entirely artificial comparison" of statistics). As this Court recognized in *Hazelwood*, 433 U.S. at 309, if employers are not permitted to rebut general work force statistics in this manner, Title VII effectively imposes liability on all public employers whose work force does not mirror the racial or sexual composition of the general population or work force. The court of appeals' decision that the representation of women in the general population or work force is the appropriate standard by which to measure compliance with Title VII effectively imposes a strict liability standard upon all employers in traditionally male-dominated job categories.[17] This expansion by the court of appeals of Title VII liability requires review by this Court.

This is not a case in which an employer has refused to hire women into traditionally male-dominated job categories, or where the trial court was confronted with an "inexorable zero" that would make otherwise relevant statistical comparisons meaningless. See *Teamsters*, 433 U.S. at 342. Eight women had been hired into this historically male-dominated job category, compared to eighty-nine men. App., *infra*, 33a; 5a. Most important, the evidence was uncontroverted that, with respect to those persons who *actually applied*, the Commission had not discriminated; women had a slightly better chance of being hired than men (2.6 percent female versus 2.5 percent male). App., *infra*, 12a. Thus, this is not a case involving "clogged channels of opportunity." *Hammon* v. *Barry*, 826 F.2d at 78 (D.C. Cir. 1987).

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[17] Rather than analyze the legal sufficiency of petitioners' statistical evidence to determine whether it had rebutted the class' case based on general population data, the Eighth Circuit concluded, in effect, that the district court jury were free to "weigh" without any constraints the competing inferences, based on the wholly unrelated statistics. App., *infra*, at 11a-12a.

More than a decade of experience with efforts to correct underrepresentation of women in traditionally male-dominated job categories in the public sector, including that of highway maintenance workers, demonstrates the difficulty of attracting sufficient numbers of qualified women applicants for certain kinds of jobs.[18] For example, in *Johnson* v. *Transportation Agency, Santa Clara County, California*, 107 S. Ct. 1442 (1987), this Court confronted a challenge to an effort by a state transportation agency to hire its first female dispatcher in a previously all-male category. The Court recognized that this effort to correct historical underrepresentation of women should be seen in the context of "[the] more specialized labor pool normally . . . necessary in determining underrepresentation in some positions," (107 S. Ct. at 1454),[19] rather than in the context of the general population or workforce. Thus, a voluntary plan might be improper if

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[18] The most recent information from the Bureau of Labor Statistics of the Department of Labor confirms that, even after years of affirmative action, only relatively small percentages of women are employed in nontraditional job categories which are comparable to maintenance work. According to recently released survey data, the following percentage of women worked these nontraditional job categories: telephone installers and repairers (11.7 percent); painters—construction and maintenance (5.6 percent); truck and tractor equipment operators (5.0 percent); helpers—construction trades (5.2 percent); garage and service station attendants (7.1 percent); farmers (15.1 percent); groundskeepers—non-farm related (5.5 percent). See Bureau of Labor Statistics, U.S. Dep't of Labor, Vol. 35, No. 1, *Household Data, Annual Averages: Employed Civilians by Detailed Occupation*, 181-185 (1988).

[19] In *Johnson*, the Court decided that a county transportation agency had not violated Title VII by taking a qualified female employee's sex into account as a factor in promoting her over a qualified male employee with a higher test score, when the decision was made pursuant to a voluntary affirmative action plan designed to correct manifest underrepresentation of women in a traditionally male-dominated job category.

it "failed to take distinctions in qualifications into account in providing guidance for actual employment decisions . . . 'regardless of circumstances such as economic conditions or the number of qualified . . . applicants.'" *Id.* at 1454, *quoting Sheet Metal Workers* v. *EEOC*, 106 S. Ct. 3019 (1986).

The Eighth Circuit's decision that the percentage of women in the general work force is the appropriate figure for comparison with the number of women in a traditionally male-dominated job category cannot be reconciled with this Court's analysis in *Johnson*. If the percentage of women in the general population is the appropriate standard by which to measure an employer's compliance with Title VII in a job category in which women generally have been historically underrepresented in the workforce, then an employer's efforts to attract women in such jobs, regardless of the relative numbers of the interested and qualified male and female applicants, would appear to conflict with *Johnson*'s requirement that an employer consider the more specialized labor pool and the number of qualified applicants. See *Janowiak* v. *City of South Bend*, No. 84-1321 (7th Cir. Dec. 16, 1987), slip op. at 11; *Hammon*, 826 F.2d at 75. Moreover, employers of traditionally male-dominated job areas are unlikely to undertake voluntary affirmative action programs to correct underrepresentation of women if their efforts will be judged, not by their individual hiring decisions, but rather by whether their work force ultimately reflects the percentage of women in the general population.

* * * *

The combination of the lower courts' reliance on general population data in a case involving a job category in which women historically have been underrepresented, and the courts' rejection of petitioners' more refined bottom line defense, operated together to deprive petitioners of any meaningful defense to Title VII class-based disparate treatment claims. The Eighth Circuit's decision

expands the potential liability of employers significantly beyond what Congress intended and inappropriately extends this Court's decision in *Teal* to class action cases. Review of the decision below is warranted to clarify the proper use of statistical evidence and burdens of proof in Title VII disparate treatment class actions alleging sex discrimination in hiring.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 19, 1988

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-1087

JANE CATLETT, PATRICIA LEEMBRUGGEN, GRACE TUTER and ADELINE KALLEMYN, individually and on behalf of all others similarly situated,

Appellees,

v.

MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION; ROBERT N. HUNTER, Chief Engineer of the Missouri Highway and Transportation Commission and V. B. UNSELL, District Engineer for District 8 of the Missouri Highway and Transportation Commission,

Appellants.

No. 86-1115

JANE CATLETT, PATRICIA LEEMBRUGGEN, GRACE TUTER and ADELINE KALLEMYN, individually and on behalf of all others similarly situated,

Appellants,

v.

MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION; ROBERT N. HUNTER, Chief Engineer of the Missouri Highway and Transportation Commission and V. B. UNSELL, District Engineer for District 8 of the Missouri Highway and Transportation Commission,

Appellees.

No. 86-1860

JANE CATLETT, PATRICIA LEEMBRUGGEN, GRACE TUTER and ADELINE KALLEMYN, individually and on behalf of all others similarly situated,

Appellees,

v.

MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION; ROBERT N. HUNTER, Chief Engineer of the Missouri Highway and Transportation Commission and V. B. UNSELL, District Engineer for District 8 of the Missouri Highway and Transportation Commission,

Appellants.

No. 86-2252

JANE CATLETT, PATRICIA LEEMBRUGGEN, GRACE TUTER and ADELINE KALLEMYN, individually and on behalf of all others similarly situated,

Appellees,

v.

MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION; ROBERT N. HUNTER, Chief Engineer of the Missouri Highway and Transportation Commission and V. B. UNSELL, District Engineer for District 8 of the Missouri Highway and Transportation Commission,

Appellants.

No. 86-2393

JANE CATLETT, PATRICIA LEEMBRUGGEN, GRACE TUTER and ADELINE KALLEMYN, individually and on behalf of all others similarly situated,

Appellees,

v.

MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION; ROBERT N. HUNTER, Chief Engineer of the Missouri Highway and Transportation Commission and V. B. UNSELL, District Engineer for District 8 of the Missouri Highway and Transportation Commission,

Appellants.

No. 86-2459

JANE CATLETT, PATRICIA LEEMBRUGGEN, GRACE TUTER and ADELINE KALLEMYN, individually and on behalf of all others similarly situated,

Appellants,

v.

MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION; ROBERT N. HUNTER, Chief Engineer of the Missouri Highway and Transportation Commission and V. B. UNSELL, District Engineer for District 8 of the Missouri Highway and Transportation Commission,

Appellees.

Appeals from the United States District Court
for the Western District of Missouri

Submitted: April 16, 1987

Filed: September 9, 1987

Before FAGG, Circuit Judge, BRIGHT, Senior Circuit Judge, and MAGILL, Circuit Judge.

FAGG, Circuit Judge.

These appeals and cross-appeals follow the entry of judgment partially in favor of and partially against the Missouri Highway and Transportation Commission in a suit combining individual and class sex discrimination claims. Our review will focus on five major issues: (1) the estoppel effect of the jury verdict on a district court acting as factfinder on coexisting equitable claims; (2) the sufficiency of the evidence of class discrimination in a case combining statistical and anecdotal evidence; (3) the calculation of class back pay awards; (4) the propriety of orders imposing gender-conscious goals with respect to future hiring; and (5) the enhancement of attorney fees. We affirm the state's liability to the class but reverse the state's liability to the individual plaintiffs and remand for modification of the relief awarded and for further proceedings consistent with this opinion.

The allegations of discrimination in this case focus on Missouri's practices and policies in hiring highway maintenance workers. Requirements for this entry-level position are an eighth-grade education and an ability to operate lightweight motor equipment, and duties include mowing highway right-of-ways, plowing snow, filling potholes, maintaining rest areas, and performing minor service and repairs on equipment. The individual plaintiffs, Jane Catlett, Grace Tuter, Adeline Kallemyn, and

Patricia Leembruggen, all applied for and were denied maintenance positions in District Eight of the Missouri Highway and Transportation Commission. These women are also members of the plaintiff class, which consists of all females who applied or might have applied for maintenance positions in District Eight between January 1, 1975, and May 31, 1980. District Eight had never employed a female maintenance worker as of July 1975, when Catlett filed the state administrative complaint that evolved into this litigation, and the District during the time period defined by the class hired eighty-nine males and only eight females.

The individual plaintiffs and the class base their claims on two federal statutes, section 1983 (that is, 42 U.S.C. § 1983) and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2. To prevail under section 1983 the individuals and the class had to prove Missouri intentionally treated them less favorably because of their sex. *See Foster v. Wyrick*, 823 F.2d 218, 221 (8th Cir. 1987). Under Title VII these claimants had the option of proving disparate treatment, that is, Missouri engaged in intentional discrimination as under section 1983, or disparate impact, that is, Missouri employed facially neutral hiring practices that in fact operated to limit job opportunities for women. *See generally International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (distinguishing disparate treatment and disparate impact theories of discrimination). The individual and class section 1983 claims were tried to a jury while the individual and class Title VII claims simultaneously were tried to the court. *See Harmon v. May Broadcasting Co.*, 583 F.2d 410, 410 (8th Cir. 1978) (per curiam).

The jury on the individual section 1983 claims returned a verdict in favor of Missouri, thus finding no intentional discrimination. The district court, however, reached a contrary conclusion when under Title VII it held for the individual plaintiffs on a disparate treat-

ment theory. *Catlett v. Missouri Highway & Transp. Comm'n (Catlett I)*, 589 F. Supp. 929, 947-49 (W.D. Mo. 1983). The jury and the court both found intentional discrimination by Missouri against the class, and the court also found Missouri's employment practices had a disparate impact on the class. *Id.* at 944-47. This disparate impact conclusion pinpointed Missouri's word-of-mouth recruiting system as the neutral factor artificially limiting opportunities for women. *Id.* at 947.

At the remedial stage the district court awarded back pay to the individual plaintiffs and the class and retained jurisdiction over the suit until January 1, 1990, to monitor the implementation of a broad order of affirmative relief. *Catlett v. Missouri State Highway Comm'n (Catlett II)*, 627 F. Supp. 1015 (W.D. Mo. 1985); *see also Catlett v. Missouri Highway & Transp. Comm'n (Catlett III)*, 643 F. Supp. 321 (W.D. Mo. 1986) (setting actual back pay amounts). The court in this order granted a classwide hiring preference, thus giving priority for future job openings to all class members still desiring employment as maintenance workers, and set a goal of thirty-seven to forty-eight percent female for the maintenance application pool and for District Eight maintenance hires during the pendency of the court order. *Catlett II*, 627 F. Supp. at 1020, 1021. The court also called for the designation "maintenanceman" to be replaced with a sex-neutral job title and detailed new recruiting, application, and interview procedures to be followed by Missouri. *Id.* at 1020-22. Finally, the district court in a later order awarded the plaintiffs attorney fees of $505,907.62 based on a fifty-percent enhancement of the hours-times-rate "lodestar" figure.

I.

Missouri argues the district court was bound by the jury verdicts in the state's favor on the individual section 1983 claims and thus lacked the power to make con-

trary factual findings and enter judgments against Missouri on the individual Title VII claims. The individual plaintiffs acknowledge the principle of law on which Missouri relies, *see Garza v. City of Omaha*, 814 F.2d 553, 557 (8th Cir. 1987); *Goodwin v. Circuit Court*, 729 F.2d 541, 549 n.11 (8th Cir.), *cert. denied*, 469 U.S. 828 (1984), but they offer three reasons why it should not apply to bar their individual Title VII recoveries here.

First, the individual plaintiffs point to Missouri's failure to rely on estoppel by jury verdict when submitting to the court proposed conclusions of law on the Title VII claims. Missouri did raise the estoppel issue at the remedial stage, *Catlett II*, 627 F. Supp. at 1017, and this satisfies our concern that a district court be given the opportunity to consider and correct perceived errors, *see Edwards v. Hurtel*, 724 F.2d 689, 690 (8th Cir. 1984) (per curiam). The *Goodwin* case, in which this court declined to apply estoppel, is distinguishable because of its "peculiar circumstances": Estoppel in that case had not been raised either to the district court or on appeal, and the party against whom estoppel was asserted had not been a party to the claim decided by the jury. *See* 729 F.2d at 549 n.11. We believe we may properly reach the estoppel issue here.

Second, the individual plaintiffs argue estoppel does not apply because the district court's Title VII decisions were based on findings beyond those made by the jury. Specifically, the individual plaintiffs point out that while the jury under section 1983 considered only the existence of intentional discrimination, the court under Title VII also considered the existence of unintentional discrimination resulting from the use of a facially neutral employment practice. As we understand the district court's opinion, however, the court drew a specific legal conclusion of disparate impact only with regard to Missouri's reliance on word-of-mouth recruiting, finding that the

existing predominantly male work force communicated information on job openings primarily to other males. *See Catlett I*, 589 F. Supp. at 946-47. Since the individual plaintiffs all applied for maintenance positions, they were not victims of this discriminatory practice, and they cannot benefit from the court's disparate impact analysis.

Third, the individual plaintiffs would avoid estoppel by voiding the jury verdicts: They argue the district court committed error by failing to grant them judgments notwithstanding the verdict on their individual claims. The judgments notwithstanding the verdict, however, were properly denied if, resolving all factual conflicts in favor of Missouri and giving Missouri the benefit of all favorable inferences, the evidence was sufficient to support the jury's conclusions. *See Gilkerson v. Toastmaster, Inc.*, 770 F.2d 133, 136 (8th Cir. 1985). We assess the sufficiency of the evidence on the ultimate question of whether Missouri intentionally discriminated against the individual plaintiffs. *See id.* at 135 (citing *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714-15 (1983)); *see also Craik v. Minnesota State Univ. Bd.*, 731 F.2d 465, 468 & n.5 (8th Cir. 1984) (section 1983 employment claim follows Title VII disparate treatment analysis).

The record suggests a variety of nondiscriminatory reasons for Missouri's refusals to hire the individual plaintiffs. Catlett in the first instance applied for a position after a hiring decision possibly had already been made (although not officially approved) and in future instances refused to update her application with the name of her current employer. Tuter and Kallemyn interviewed for vacancies eventually filled by males with prior highway maintenance experience, and Leembruggen did not list on her application the lightweight equipment skills required for the job. In addition, although each plaintiff's application remained active for a year, the

state had a policy of considering most maintenance candidates only once during that period. The individual plaintiffs respond that certain of these hiring rationales, while facially legitimate, are inherently discriminatory and as a matter of law cannot support the individual verdicts in favor of Missouri. *Cf. O'Connor v. Peru State College*, 781 F.2d 632, 636 (8th Cir. 1986). The individual plaintiffs, however, did not raise this argument in their motion for judgments notwithstanding the verdict, and they do not on appeal find fault with the jury instructions for failing to reflect this theory. Any challenge to Missouri's hiring rationales as being inherently discriminatory has not been adequately raised and preserved.

Because the record contains ample evidence to support the jury's verdicts for Missouri on the individual section 1983 claims, we affirm those verdicts and further hold the verdicts bar judgments against Missouri on the individual Title VII claims.

II.

Turning to the class claims, we focus our review on the jury's and court's findings of intentional discrimination. A finding of classwide intentional discrimination requires proof by a preponderance of evidence that the employer engaged in a pattern or practice of unlawful discrimination. *Briggs v. Anderson*, 796 F.2d 1009, 1019 (8th Cir. 1986); *see also Hervey v. City of Little Rock*, 787 F.2d 1223, 1228 n.3 (8th Cir. 1986) (same test under section 1983 as under Title VII). A pattern or practice is present when the discriminatory acts were not isolated, insignificant, or sporadic, but were repeated, routine, or of a generalized nature; in other words, discrimination must have been "the company's standard operating procedure—the regular rather than the unusual practice." *Teamsters*, 431 U.S. at 336 & n.16.

The class in this case presented both statistical evidence revealing a disparity between the number of fe-

males hired and the number expected to be hired and anecdotal evidence recounting instances of discrimination against specific class members. Either of these types of proof alone may be sufficient to establish a pattern or practice of discrimination, *see Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08 (1977) (statistics); *Briggs*, 796 F.2d at 1019 (anecdotal evidence); thus, neither is "automatically entitled to reverence to the exclusion of the other." *Coates v. Johnson & Johnson*, 756 F.2d 524, 533 (7th Cir. 1985). For example, while a class claim may fail despite proof of discrimination against one or more individuals, a class claim may succeed despite employer rebuttal of alleged instances of discrimination involving class representatives and testifying class members. *Id.* at 532-33. The inadequacy of the class' statistics by themselves to establish discrimination does not foreclose recovery; rather, the question is whether the totality of the evidence makes it more likely than not that the statistical disparity between expected and actual female hires resulted from the discriminatory decisionmaking. *See Palmer v. Shultz*, 815 F.2d 84, 96-97 (D.C. Cir. 1987); *see also Bazemore v. Friday*, 106 S. Ct. 3000, 3009 (1986). Missouri's statistical arguments thus will not alone be dispositive, and we need just examine the class' statistical evidence (the admissibility of which is not challenged on appeal) for whatever weight it might contribute to the class disparate treatment judgments.

In this case the record of anecdotal evidence, read in the light most favorable to the class, reveals numerous instances suggesting Missouri was not receptive to the idea of female maintenance workers. For example, one supervisor, upon being told that a woman had applied for a maintenance position, became angry and said, "You send that [expletive] in here, and now I'm going to have to hire her." Another female was advised not to apply at a particular location because "the fellow up there is not about to hire a woman."

The male highway employees responsible for interviews and hiring tended to discount female applicants' abilities and expressions of interest in maintenance work: one was told the job was "very physical * * * for a woman"; one was told, "I don't think you want this job"; one was referred to a secretarial job; one was encouraged to return to teaching. In filling out review sheets interviewers discounted farm and other types of experience listed by female applicants while finding similar experience relevant when possessed by male applicants. One woman was deemed "not one to do dirty work" even though at the time of her interview she lived and worked on a farm and her background included work on a chicken ranch. Other review sheets remarked on female applicants' looks, including, for example, speculation that one woman interviewee was wearing false eyelashes.

During the interviews the male supervisors emphasized the unpleasant aspects of the maintenance job, such as the lack of restroom facilities and the removal of dead animals from the road; questioned whether women might be offended by the language of male coworkers; and suggested that the female applicants' husbands might object to their maintenance work. One woman was told she might have to lift a 100-pound snowplow by herself, even though the men usually didn't have to do it alone. Occasionally the interviews were conducted not privately but in the presence of a number of male workers who would snicker and tell "scare stories" about unpleasant things that had happened on the job. Female applicants had difficulty interesting interviewers in their qualifications; some were never told of the salary or benefits for the maintenance job; and at least two were informed the highway department already had men in mind for the openings for which they were being considered. As a result of their interviews female applicants generally felt they were not being seriously considered for maintenance positions, and one was even so discouraged by a pre-

interview phone conversation of this nature that she decided not to attend her interview.

The class' statistical evidence, which reveals that females constituted up to forty-eight percent of the relevant work force, compared to less than ten percent of Missouri's maintenance hires during the class period, serves to reinforce the suggestion that these discriminatory incidents were not isolated or sporadic but were representative of Missouri's standard operating procedure. While Missouri argues that the class in defining the relevant work force failed to consider the actual interest of otherwise qualified men and women in maintenance work, Missouri bore the burden of introducing evidence to show this failure was significant: "[M]ere conjecture or assertion on [a] defendant's part that some missing factor would explain the existing disparities between men and women generally cannot defeat the inference of discrimination created by [a] plaintiff['s] statistics." *See Palmer*, 815 F.2d at 101 & n.13 (interpreting *Bazemore, supra*). Missouri, however, introduced no direct evidence demonstrating that a lesser interest in highway maintenance work on the part of females accounted for the disparity between the percentage of such positions held by females and the percentage of females in the work force defined by the class. Expert testimony from both sides established that Missouri's statistics showing no discrimination also did not necessarily accurately reflect male versus female interest. The jury and court were entitled to consider the class' statistics and judge their credibility. *See id.*

Furthermore, Missouri cannot shield itself from liability by pointing out that it hired 2.6 percent of female maintenance applicants (8 of 312) and only 2.5 percent of male maintenance applicants (89 of 3,566). Victims of a discriminatory policy cannot be told they have not been wronged because other females have been hired. *See Con-*

necticut v. Teal, 457 U.S. 440, 455 (1982); *see also, e.g., Craik*, 731 F.2d at 474 (males and females were selected at equal rates but no female ever prevailed when another candidate was male). While the equal hiring rate constituted relevant evidence, *see Teal*, 457 U.S. at 454, it did not entitle Missouri to judgment as a matter of law. The jury and court were free to weigh the inference of nondiscrimination arising from the hiring rate against the inference of discrimination arising from the class' anecdotal and statistical evidence.

This evidence, viewed in its totality, was sufficient to support the jury's verdict and the court's conclusion that Missouri in hiring highway maintenance workers engaged in a pattern or practice of discrimination against women. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 573-76 (1985); *Gilkerson*, 770 F.2d at 136. We uphold the judgments in favor of the class under both section 1983 and Title VII.

III.

Victims of discrimination under Title VII are entitled to be "made whole," that is, to be restored, as nearly as possible, to the positions in which they would have been absent the discrimination. *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763-64 (1976); *Briseno v. Central Technical Community College Area*, 739 F.2d 344, 347 (8th Cir. 1984); *see* 42 U.S.C. § 2000e-5(g). The scope of the relief, such as back pay, to be awarded each member of a prevailing class generally will be determined through individualized hearings, with the court recreating past employment relationships to determine when a particular class member should have been hired. *Teamsters*, 431 U.S. at 361, 371-72; *see Hameed v. International Ass'n of Bridge, Structural & Ornamental Iron Workers*, 637 F.2d 506, 519 (8th Cir. 1980).

A court, however, retains equitable discretion to fashioh an appropriate remedy when, for example, the number

of qualified class members exceeds the number of openings lost to the class through discrimination and identification of the individuals entitled to relief would "drag the court into 'a quagmire of hypothetical judgments'" and result in "mere guesswork." *Segar v. Smith*, 738 F.2d 1249, 1289-90 (D.C. Cir. 1984) (quoting *Thompson v. Boyle*, 499 F. Supp. 1147, 1170 (D.D.C. 1980) (quoting *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 260 (5th Cir. 1974))), *cert. denied*, 471 U.S. 1115 (1985). In such a situation a court may, as the district court did in this case, award relief on a classwide, rather than individual, basis by calculating the number of positions for which class members should have been hired and distributing pro rata among all qualified class members the total amount of back pay for which the defendant may be held responsible. *E.g.*, *Hameed*, 637 F.2d at 520-21; *see Catlett II*, 627 F. Supp. at 1019. This method of distribution does not contravene the mandate of *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 579-82 (1984), that make-whole relief be limited to actual victims of discrimination, because qualified members of the class certified by the court are presumptively victims of discrimination absent proof, which Missouri has not made in this case, to the contrary. *See Teamsters*, 431 U.S. at 361-62. We find no basis for disturbing the district court's determination to adopt a classwide back pay scheme. *See Segar*, 738 F.2d at 1290.

Missouri, however, argues the district court committed error in its execution of the classwide remedy by overestimating the number of female maintenance workers who would have been hired absent discrimination. The court relied on District Eight labor force statistics and the class' definition of the relevant work force to determine Missouri should have hired forty-six female maintenance workers during the class period. Eight females were hired, so the court calculated Missouri's total class back pay liability based on thirty-eight "fe-

male" positions. *See Catlett II*, 627 F. Supp. at 1019 (referring to labor pool definition in *Catlett I*, 589 F. Supp. at 933). Missouri argues the court in identifying the number of "female" positions instead should have relied on the percentage of maintenance applicants who were female.

This court has recognized that general population or labor force statistics in certain cases may be superior to applicant flow data for use in fashioning back pay remedies. *E.g., EEOC v. Rath Packing Co.*, 787 F.2d 318, 336-37 (8th Cir.), *cert. denied*, 107 S. Ct. 307 (1986). It was incumbent on Missouri to demonstrate that the district court in this case abused its discretion in relying on labor force data, *see id.* at 336, yet Missouri in attacking the calculation of thirty-eight positions merely revives in disguised form its statistical attempts to exculpate itself by arguing lack of female interest. In light of the court and jury findings that Missouri engaged in discriminatory employment practices, we cannot accept a theory that would result in the denial of all back pay. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975).

Missouri is entitled to foreclose from sharing in the classwide back pay award individual class claimants who were not qualified for maintenance positions, and the district court granted the state's request to exclude from the recovery ten women who did not timely assert their abilities to operate lightweight motor equipment. *See Catlett II*, 627 F. Supp. at 1018. We find no basis for reversing the district court's decisions to retain in the class other females challenged by Missouri, and the state cannot now advance individual objections not included in its motion for summary judgment at the relief stage.

Plaintiffs Catlett, Tuter, Kallemyn, and Leembruggen may suggest that since they have lost their individual recoveries, they now should be allowed as class members

to share in the classwide back pay award. The district court had no occasion to consider this argument, and it has not been fully briefed on appeal. Thus, we do not decide the question at this time. The district court may consider this issue if raised and disputed on remand (resolution in the plaintiffs' favor, of course, would not increase Missouri's total back pay liability beyond the amount attributable to the thirty-eight "female" positions).

The district court's grant of a classwide hiring preference, however, raises different concerns than the classwide award of back pay, because the thirty-eight positions which should have gone to women cannot be so easily divided and distributed among the entire class. *Cf. Albemarle Paper Co.*, 422 U.S. at 416 (Title VII statutory scheme "implicitly recognizes that there may be cases calling for one remedy but not another"). The district court's hiring order potentially requires Missouri to give preference not to thirty-eight women but to all of the more than 150 qualified class members among whom the back pay award was split (approximately eighty members of the class have expressed continued interest in highway work). To the degree this hiring order benefits a greater number of females than would have been hired absent discrimination, the order exceeds a make-whole purpose and constitutes a form of affirmative relief we find unwarranted in this case under principles to be discussed *infra*. *See generally Berkman v. City of New York*, 705 F.2d 584, 595-97 (2d Cir. 1983).

Thus, on remand, the district court should either eliminate the hiring preference or limit it to thirty-eight positions to be allocated equitably among the interested and qualified class members. In either instance class members not receiving preferences will be entitled to reapply and receive full and fair consideration for maintenance positions.

IV.

Affirmative relief, in contrast to individual and class-wide relief, serves "not to make identified victims whole, but rather to dismantle prior patterns of employment discrimination and to prevent discrimination in the future." *Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 106 S. Ct. 3019, 3049 (1986) (plurality). Gender-conscious remedies benefiting individuals not identified as victims of the discrimination (e.g., members of the minority group outside the scope of the class) may be necessary for this purpose in some instances, as when an employer has engaged in persistent discrimination; however, affirmative action will not be an appropriate remedy in a majority of Title VII cases. *Id.* at 3050. A district court before exercising its discretion to order affirmative action should particularly consider the efficacy of alternate remedies. *Sheet Metal Workers*, 106 S. Ct. at 3050, 3053; *id.* at 3056 (Powell, J., concurring); *see United States v. Paradise*, 107 S. Ct. 1053, 1067 (1987) (plurality); *id.* at 1075 (Powell, J., concurring). In contrast, the district court in this case justified its establishment of hiring and applicant pool goals only with a reference to Missouri's "long history of discrimination and the comparatively short history of attempts to end such discrimination." *See Catlett II*, 627 F. Supp. at 1020.

Supreme Court precedents illustrate the inadequacy of this justification. For example, in *Sheet Metal Workers, supra*, the defendant union initially had been found guilty of discrimination in a state administrative proceeding in 1964. The federal action had been instituted in 1971 after the union had flouted state administrative and judicial remedies, plus the union by the time affirmative action was decreed had twice been found in contempt of federal court remedial orders. Similarly, the affirmative remedy challenged in *Paradise, supra*, was imposed only when eleven years after the finding of discrimination the defendant employer still had not developed a suitable plan

for making promotions. The Supreme Court in each instance emphasized that the lower court had mandated affirmative action only after the defendant had failed to live up to court-ordered commitments to eliminate discriminatory practices. *See Paradise*, 107 S. Ct. at 1066. Thus, the race-conscious remedies benefiting nonvictims were supported not only by the societal interest in eradicating discrimination but also by the societal interests in ensuring compliance with court decrees and eliminating the effects of delays in compliance. *Id.* at 1067; *see also Sheet Metal Workers*, 106 S. Ct. at 3055 (Powell, J., concurring).

Applying these principles to the case before us, we cannot say Missouri has a "long history of 'foot-dragging resistance' to court orders" such that simply enjoining the state from further discrimination would clearly be futile. *See id.* at 3051. The Supreme Court has not yet approved a court-ordered race- or gender-conscious remedy against a defendant which has not been given a chance voluntarily to bring its personnel practices into compliance with a generalized injunction against further discrimination. We decline to take that step here.

Thus, we vacate those portions of the district court's order establishing a goal of thirty-seven to forty-eight percent female for Missouri's applicant pool and new maintenance hires. In addition, it will not be necessary for the district court to retain jurisdiction to monitor compliance with its order, and Missouri will not be required to provide to the court the statistics set out in the court's appendix A. *See Catlett II*, 627 F. Supp. at 1021. Missouri, however, should maintain all applications, interview sheets, and related records in case further litigation becomes necessary.

The order imposing hiring goals shall be replaced by a generalized injunction prohibiting further discrimination by Missouri in hiring highway maintenance workers, and

nothing in our opinion should be construed as diminishing Missouri's obligation to take effective, affirmative steps to publicize employment opportunities and manifest its receptiveness to female maintenance applicants. We particularly observe that the thirty-seven to forty-eight percent female goal selected by the district court reflects the jury's and the court's view of the evidence in this case and may prove a useful standard for Missouri in evaluating its own compliance with our injunction. Because we do not understand Missouri to challenge any other portions of the award of injunctive relief, we uphold the district court's remedial order in all aspects not mentioned.

V.

The class as a prevailing party is entitled to recover attorney fees. *See Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983); 42 U.S.C. §§ 1988, 2000e-5(k). Calculation of the amount to be awarded begins with a determination of the hours reasonably expended on the matter plus an appropriate billing rate. *Hensley*, 461 U.S. at 433 & n.7. The district court here allowed all of the 4,658 hours claimed by class counsel and multiplied those hours by a billing rate varying from $50 per hour for time expended in 1978 up to $100 per hour for time expended in 1986. The court then enhanced this award by fifty percent, citing the "substantial risk" incurred by class counsel "in expending so many billable hours over a nine-year period" and the success of the class in securing hiring preferences and gender-conscious relief. Missouri on appeal argues only (1) that enhancement based on success or risk of loss was inappropriate as a matter of law; and (2) that the district court committed error in failing to disallow those hours representing wheelspinning and duplication, those hours spent unsuccessfully pursuing the individual claims, and those hours spent unsuccessfully opposing Missouri's move to limit the class, which was originally certified statewide, to District Eight.

A district court, because of its "special understanding" of the degree of complexity of a case, is best equipped to determine the reasonableness of the hours expended by counsel, and an appeal on this issue will succeed only where the district court abused its discretion or committed error in implementing the controlling legal standards. *Moore v. City of Des Moines*, 766 F.2d 343, 345-46 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 805 (1986). The fee award should not compensate counsel for those hours expended in pursuit of unsuccessful claims "distinct in all respects" from the successful claims. *Hensley*, 461 U.S. at 440. Where the hours expended are not easily allocable because the unsuccessful and successful claims were related, the court may merely reduce the award in its discretion to an amount reasonable in relation to the result on the merits, *id.* at 435, 440, but a plaintiff who has achieved substantial success should receive a fully compensatory fee despite the failure of the district court to adopt every contention raised. *Id.*

The class argues the district court properly included in the fee award attorney hours spent defending statewide class certification because the issue constituted an incidental contention that, despite its rejection, was reasonably raised in pursuit of the substantial success achieved on the discrimination claims. *Cf. Monroe v. United Air Lines*, 565 F. Supp. 274, 285-86 (N.D. Ill. 1983) (supplemental order) (unsuccessful motion for preliminary injunctive relief); *Easley v. Anheuser-Busch, Inc.*, 572 F. Supp. 402, 416 (E.D. Mo. 1983) (unsuccessful motion for partial summary judgment), *aff'd in part, rev'd in part on other grounds*, 758 F.2d 251 (8th Cir. 1985); *Bruno v. Western Elec. Co.*, 618 F. Supp. 398, 404 (D. Colo. 1985) (unsuccessful motion to compel discovery); *Laffey v. Northwest Airlines*, 572 F. Supp. 354, 362 n.8, 364 & n.11 (D.D.C. 1983) (unsuccessful motion for revision of the postjudgment interest rate), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 4 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985).

Hensley, however, emphasizes the degree to which work on an unsuccessful claim may also be deemed to have been expended on the successful claim or claims. 461 U.S. at 435. While the district court's decision regarding the scope of the class necessarily took into consideration the facts and legal theories on which the District Eight action was based, the extra efforts expended in attempting to defend statewide certification did not in general contribute to the advancement of the District Eight claim, and attorney time spent studying hiring practices in other districts apparently was easily segregable, *see id.* The use at trial of a few pieces of evidence uncovered during statewide class discovery is insufficient to justify a fee award covering all of the approximately 643 attorney hours expended on non-District Eight matters. *See Webb v. County Bd. of Educ.*, 471 U.S. 234, 243 (1985). The statewide discovery was made not so much on behalf of the District Eight class in pursuit of its discrimination claims as on behalf of other female highway maintenance applicants throughout the state, and the non-District Eight women were not for the purposes of this litigation prevailing parties entitled to attorney fees. We conclude that attorney hours spent relative to statewide class certification should have been excluded from the fee award in this case. *See Bennett v. Central Tel. Co.*, 619 F. Supp. 640, 646-47 (N.D. Ill. 1985); *In re Mid-Atlantic Toyota Antitrust Litig.*, 605 F. Supp. 440, 447 (D. Md. 1984); *see also Richardson v. Restaurant Mktg. Assocs.*, 527 F. Supp. 690, 699 (N.D. Cal. 1981) (pre-*Hensley* case).

We also conclude, however, that fees were properly awarded for time spent pursuing the unsuccessful individual claims. A court should not disallow attorney hours related and necessary to successful claims, *Carmichael v. Birmingham Saw Works*, 738 F.2d 1126, 1137 (11th Cir. 1984), and our discussion in section II, *supra*, explains the relevance to the class pattern or practice claim of evidence of individual incidents of discrimination. Fur-

thermore, the district court did not abuse its discretion in failing to reduce attorney hours for inefficiency and duplication of services. We cannot find the hours claimed by the class excessive when, as illustrated by comments in the record, the pervasive documentary and statistical evidence and exhibits in this case created special burdens for the parties.

Class counsel's allowable and reasonably expended hours, if multiplied by a reasonable rate, presumptively resulted in an adequate fee award. *See Blum v. Stenson*, 465 U.S. 886, 897 (1984). Time and rate calculations reflect most factors relevant to attorney compensation, and absent a specific showing that an hours-times-rate "lodestar" amount is inadequate, a district court which enhances a fee award engages in impermissible double counting. *See id.* at 898-900. The class here did not present evidence that the success achieved through the litigation was not reflected in the lodestar factors. *See id.* at 900 & n.16. Nor did the class demonstrate that enhancement was necessary to attract competent local counsel in light of the risk of loss arising from the class' contingency fee arrangement. *See Pennsylvania v. Delaware Valley Citizens Council for Clean Air*, 107 S. Ct. 3078, 3089 (1987); *id.* at 3090-91 (O'Connor, J., concurring in part). Thus, the district court's enhancement of the class fee award may not be upheld on either ground challenged by Missouri.

The risk of losing the case, and thus the fee, however, must be distinguished from the loss a prevailing attorney experiences due to the delay in collecting the statutory fee award. *Id.* at 5115. A delay in the receipt of fee payment, because of inflation and lost interest, "dilutes the eventual award and may convert an otherwise reasonable fee into an unreasonably low one." *Johnson v. University College of the Univ. of Ala.*, 706 F.2d 1205, 1210-11 (11th Cir.), *cert. denied*, 464 U.S. 994 (1983). A fee award based on the rates in effect at the time

attorney hours were expended ("historic rates") will not be fully compensatory unless the award accounts in some way for the loss due to delay in payment. *Daly v. Hill*, 790 F.2d 1071, 1081 (4th Cir. 1986). A court may account for this loss by enhancing the lodestar. *Id.*

The district court in this case used historic rates in calculating the lodestar award, and we believe the court, in its reference to the nine-year duration of this litigation, was basing its enhancement at least in part on the lost value of the fee due to delay in payment. The class argues that the fifty-percent enhancement may be justified totally on this basis. The average rate of about $71 per hour contemplated by the unenhanced award would have been entirely inadequate, *see Paxton v. Union Nat'l Bank*, 806 F.2d 785, 786 (8th Cir. 1986), and the average rate realized by class counsel after enhancement is still less than $110 per hour, a figure well in keeping with current market rates, *cf. Ramos v. Lamm*, 713 F.2d 546, 555 (10th Cir. 1983) (using current market rates as approximating historic rates adjusted for inflation and lost interest).

Shortly after the district court entered its fee order, however, the Supreme Court held a fee enhancement to compensate for delay in payment equivalent to an award of interest. *Library of Congress v. Shaw*, 106 S. Ct. 2957, 2965-66 (1986). Because interest is not available in suits against the United States absent "express congressional consent * * * separate from a general waiver of immunity to suit," *id.* at 2961, the Court disallowed an enhanced fee award made against the federal government under Title VII. At least one circuit has extended the "express waiver of interest" rule to eleventh amendment immunity, thus limiting the use of enhancements for delay in assessing fees against states. *Rogers v. Okin*, 821 F.2d 22 (1st Cir. 1987). Furthermore, the district court here used a similar federal-state analogy in finding the eleventh amendment barred the class' re-

covery of prejudgment interest on the back pay award. *Catlett II*, 627 F. Supp. at 1019-20.

Because the parties have not yet briefed or argued immunity in the context of fee enhancement or seriously explored the reach of *Shaw*, we remand to allow the district court to consider thoroughly this important question and make a comprehensive disposition of both the enhancement and prejudgment interest issues. Missouri has not waived any of its rights should immunity be found; the eleventh amendment may be raised at any time. *See Edelman v. Jordan*, 415 U.S. 651, 677-78 (1974); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 466-67 (1945); *Rose v. Nebraska*, 748 F.2d 1258, 1262 (8th Cir. 1984), *cert. denied*, 106 S. Ct. 61 (1985).

In sum, the district court on remand should eliminate from the fee calculation hours spent unsuccessfully defending statewide certification and should similarly adjust paralegal hours and other expenses included in the award. If the district court has counted certain taxable costs twice, this correction should be made. Enhancement will not be available if Missouri is protected under the eleventh amendment from awards of interest; however, if Missouri is not immune the district court in its discretion may enhance the class fee award to compensate for delay in payment. If Missouri is not immune the district court should also exercise its discretion regarding prejudgment interest on the back pay award. Missouri, in light of the intervening Supreme Court decision in *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 107 S. Ct. 2494 (1987), will be free to challenge the assessment against it of the class' expert witness fees.

VI.

We have carefully considered Missouri's additional challenges, for example, to the jury instructions and to the district court's conduct at trial, and we find no re-

versible error. We need not reach Missouri's argument regarding the failure of plaintiffs Tuter, Kallemyn, and Leembruggen to file complaints with the Equal Employment Opportunity Commission, *see* 42 U.S.C. § 2000e-5(e), (f), because we reverse the individual judgments in favor of those plaintiffs. Also, we need not reach Missouri's argument that under the eleventh amendment the Highway and Transportation Commission was not a proper party to the section 1983 actions; all relief awarded is supportable under Title VII and/or against proper section 1983 defendants. Missouri's argument regarding the absence at the remedial stage of any non-applicant claimants mistakes the nature of the classwide award of relief and cannot justify a reduction in Missouri's total back pay liability; the identity of the class claimants does not change the number of positions which absent discrimination would have been filled by women. On cross-appeal we review the district court's class certification ruling for abuse of discretion, *see Shapiro v. Midwest Rubber Reclaiming Co.*, 626 F.2d 63, 71 (8th Cir. 1980), *cert. denied*, 449 U.S. 1079 (1981), and we find no abuse in the denial of a statewide class here.

We affirm the Title VII and section 1983 judgments in favor of the class, affirm the section 1983 judgments against the individual plaintiffs, reverse the Title VII judgments in favor of the individual plaintiffs, and remand to the district court for further proceedings consistent with this opinion.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

UNITED STATES DISTRICT COURT
W.D. MISSOURI, C.D.

No. 78-4061-CV-C-5

JANE CATLETT, PATRICIA LEEMBRUGGEN, GRACE TUTER and ADELINE KALLEMYN, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION, *et al.*,

Defendants.

Dec. 5, 1983

Lisa Van Amburg, Karen Plax, Raytown, Mo., for plaintiffs.

John Gladden, Asst. Counsel, Paula Lambrcht, Asst. Counsel, Missouri Highway & Transp. Com'n, Jefferson City, Mo., for defendants.

ORDER AND MEMORANDUM

SCOTT O. WRIGHT, District Judge.

I. *Introduction*

Plaintiffs have filed a class action sex discrimination suit against the Missouri Highway and Transportation Commission (hereafter "Highway Commission") pursuant to 42 U.S.C. § 1983 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* The representa-

tive plaintiffs, Jane Catlett, Patricia Leembruggen, Grace Tuter and Adeline Kallemyn, allege as individuals and on behalf of the class that the Highway Commission failed and refused to hire women for the position of maintenanceman on the basis of gender, established and maintained job classifications which resulted in the exclusion of women, maintained a policy and practice of recruitment which had the effect of denying job opportunities to qualified female applicants, and refused to implement objective guidelines to correct the alleged discriminatory practices.

The remedies sought by the plaintiffs include damages for back wages and lost benefits of employment, as well as declaratory and injunctive relief. On April 26, 1982, pursuant to Fed.R.Civ.P. 42(b), the Court ordered that the suit be severed into separate trials on the issues of (a) liability and (b) prospective equitable relief, monetary damages and attorneys' fees. By order dated August 9, 1982, the Court certified the class to encompass all women who applied or who might have applied for a maintenance position in District Eight of the Highway Commission between January 1, 1975 and the last day of May, 1980.

Plaintiffs' cause of action under 42 U.S.C. § 1983 was brought against the Highway Commission, Robert N. Hunter in his official capacity as Chief Engineer of the Highway Commission, and V.B. Unsell in his official capacity as the District Engineer for District Eight of the Highway Commission. The trial of this case commenced on September 15, 1983 and concluded on September 23, 1983. On the § 1983 claims, the jury returned verdicts in favor of the class and against the Commission, Hunter, and Unsell, and returned verdicts for the defendants on the individual § 1983 claims of the four named plaintiffs.

On the Title VII claim, the Court, having heard the testimony at trial and having reviewed the voluminous

exhibits submitted by the parties, has concluded for the reasons discussed below that the Highway Commission, through its recruitment and hiring policies, engaged in a pattern and practice of sex-based employment discrimination against the class. The Court also finds that the individual plaintiffs were denied employment opportunities by the Highway Commission because of their sex in violation of Title VII.

FINDINGS OF FACT

1. Named plaintiffs Jane Catlett, Grace Tuter, Adeline Kallemyn and Patricia Leembruggen are female citizens of the United States and resided in the Western District of Missouri at all times relevant to this suit.

2. The defendant Missouri Highway & Transportation Commission is an agency of the State of Missouri organized and existing under the laws of the State of Missouri and is an employer within the meaning of Title VII of the Civil Rights Act of 1964. Its headquarters and central personnel division are located in Jefferson City, Missouri. The Commission is the agency responsible for the maintenance and upkeep of the roads in the State of Missouri. On January 1, 1980, the Missouri State Highway Commission merged with the Missouri Department of Transportation to become the Missouri Highway & Transportation Commission. The Missouri Highway & Transportation Commission is divided geographically into ten district which are composed of counties and the City of St. Louis.

3. District Eight of the Highway Commission is headquartered in Springfield, Missouri, and consists of the Missouri counties of Christian, Dallas, Greene, Hickory, Laclede, Phelps, Polk, Pulaski, Stone, Taney and Webster.

4. Each of the ten districts of the Missouri Highway & Transportation Commission is headed by a District En-

gineer and each district has a Maintenance and Traffic Division which is headed by a District Maintenance and Traffic Engineer.

5. The job which is the subject matter of this action is the "maintenanceman" position, which is under the Maintenance & Traffic Division. The Maintenance & Traffic Division is responsible for the upkeep of the 32,000-mile highway system of the State of Missouri and conducts traffic studies of operational improvements to the highway system. The Maintenance & Traffic Division has the largest number of employees of any division and the maintenanceman job is the single largest job category in the Highway Commission. The Highway Commission considered the maintenanceman position to be an unskilled or semi-skilled position.

6. The maintenanceman job is the entry level position within the Maintenance and Traffic Division, requiring no prior experience with the Highway Department before initial hire. It is the largest single job category in the Missouri Highway & Transporation Commission. The basic requirements for initial hire into the maintenanceman job are that the person have at least an eighth-grade education and an ability to operate lightweight motor equipment such as pickup trucks, tractors or mowers. The maintenanceman job consists of a variety of low-skilled or semi-skilled duties such as mowing the right-of-way, plowing snow off the roads in the winter, filling potholes, maintaining buildings and rest areas, and performing minor maintenance tasks on equipment.

7. Plaintiff Jane Catlett filed a charge of discrimination with the Missouri Commission on Human Rights on July 21, 1975, and a similar charge with the Equal Employment Opportunity Commission on March 20, 1976, alleging that the Highway Commission failed to hire her for a maintenanceman position because of her sex. On December 15, 1976, the Highway Commission received a

notice from the Equal Employment Opportunity Commission of Catlett's charge of discrimination. Catlett received a "notice of right to sue" letter from the United States Department of Justice on December 6, 1977. Plaintiff Catlett filed this lawsuit on March 3, 1978, within ninety days of the receipt of her notice of right to sue.

8. Federal jurisdiction is invoked pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1343, 28 U.S.C. §§ 2201 and 2202, and 42 U.S.C. 2000e *et seq.*

9. Jane Catlett was the only plaintiff to file a charge of discrimination with either a state or federal agency. Individual plaintiffs Kallemyn, Tuter and Leembruggen fail to file any discrimination charge with any state or federal agency.

Recruitment Process for the Maintenanceman Job

10. The Highway Department in District Eight relied primarily on word-of-mouth recruitment for the maintenanceman position from January 1, 1975 through May 31, 1980. Occasionally, the Highway Commission in District Eight would notify the Missouri Division of Employment Security of job vacancies in the maintenanceman position, but most job applicants applied directly to the Highway Commission by walk-in application.

11. The Highway Commission in District Eight did not advertise in the news media for applicants for the maintenanceman position from January 1, 1975 through May 31, 1980.

12. The maintenanceman work force in District Eight was all male until December, 1976, when the first female was hired by the Commission.

13. For purposes of evaluating the impact of the Highway Commission's recruitment procedures in District Eight, a moderate definition of the applicant pool to which the actual number of applicants could be com-

pared is that group of persons who reside within the eleven counties of District Eight and who are in the civilian labor force as defined by the United States Census for 1970 and for 1980 in the job categories of sales, blue collar, farm, service and clerical, but excluding managerial, technical and professional workers, and who are between the ages of eighteen and seventy years and who have a driver's license and an eighth-grade education.

14. A more conservative definition of the applicant pool for District Eight would be that group of persons who reside within the eleven counties of District Eight and who are in the civilian labor force as defined by the United States Census for 1970 and for 1980 in all job categories except managerial, technical, professional and clerical workers and who are between the ages of eighteen and seventy years and who have a driver's license and an eighth-grade education.

15. The available applicant pool in District Eight can be estimated for each year between 1970 and 1980 by adjusting the census data on a straight line method so as to allocate the difference in the numbers in the census data between 1970 and 1980 equally in each year. The percentages of women in the relevant labor pool under the moderate definition ranged from 42% in 1970 to 48% in 1980, and under the conservative definition the percentages ranged from 32% in 1970 to 37% in 1980.

16. In District Eight, the following numbers of males and females were hired during the relevant time period for the maintenanceman position.

	Males Hired	Females Hired
1975	8	0
1976	2	1
1977	21	2
1978	21	5
1979	16	0
1980 (1/1-5/31)	2	0

17. The actual and expected number of female applicants for the maintenanceman position in District Eight, based on census data of the relevant applicant pool, and assuming a recruitment process which does not have an adverse impact on potential female applicants, is as follows:

	Female Applicants	Female Applicants Expected, Conservative Definition of Labor Force	Female Applicants Expected, Moderate Definition of Labor Force
1975	9	183	304
1976	16	234	304
1977	55	285	369
1978	120	326	424
1979	88	270	350
1980 (1/1-5/31)	24	103	133

The disparity in the actual number of females who applied for the maintenanceman jobs in District Eight compared to the number of expected female applicants based on the conservative and moderate definitions of the applicant pool is statistically significant.

18. In District Eight of the Highway Commission, the static maintenanceman workforce as of January 1st of each year was as follows:

			Expected No. of Female Workers	
	Males	Females	Conservate Definition	Moderate Definition
1975	198	0	69	90
1976	193	0	68	89
1977	192	0	69	90
1978	190	2	70	91
1979	189	6	72	93
1980	188	5	73	93

There is a statistically significant disparity in the number of women in the static workforce compared to the

number of women in the available labor force in District Eight under both the conservative and moderate definitions in each year for 1975 through 1980.

19. The actual number of females hired in District Eight for the maintenanceman position compared to the number of females expected to be hired under the conservative and moderate definitions of the labor force is as follows:

	Total Hires	Females Hired	Expected Hires, Conservative Definition	Epected Hires, Moderate Definition
1975	8	0	3	4
1976	22	1	8	10
1977	23	2	8	11
1978	26	5	9	12
1979	16	0	6	8

For the years 1976 through 1979, there is a statistically significant difference between the number of women hired for maintenanceman positions in District Eight and the number of women expected to be hired under the conservative and moderate definitions of the labor force.

20. Of the 89 males who were hired for the maintenanceman position in District Eight during the relevant time period, 29 of them either listed on their applications references who were employees of the Highway Commission, or had interview sheets which reflected that they were known by Highway Commission employees.

21. After the Highway Commission began hiring women for maintenanceman positions on December 1, 1976, the number of women applying for the position in subsequent years increased substantially.

22. The females listed on Plaintiff's Exhibit 421 filed applications for maintenanceman positions in District Eight between January 1, 1975 and May 31, 1980 and were not hired for entry maintenanceman jobs. These

female applicants are members of the class except for those who have requested to be excluded from the class according to the court records.

23. All of the male applicants listed on Plaintiff's Exhibit 408 were hired for entry maintenanceman jobs in District Eight between January 1, 1975 and May 31, 1980, and at the time they were hired there were qualified female applicants, with the exception of two hires on February 1, 1975.

24. In December of 1976, Chief Engineer Robert N. Hunter issued a directive to all District Engineers to the effect that the Commission's traditional methods of recruitment must no longer be relied upon to recruit female and minority applicants, and that advertising should be undertaken to increase the number of female and minority applicants. Hunter directed that local population statistics should be used as a guide in recruitment efforts. Neither Hunter nor the District Engineer in District Eight, V.B. Unsell, however, followed through or implemented this directive nor took any meaningful steps to increase the number of female applicants. Despite the directive, there were no advertisements in the media for the maintenanceman openings, nor were efforts made to contact women's groups in the community to advise the public of the Highway Commission's willingness to hire women as maintenancemen in District Eight.

Application Procedures of the Highway Commission

25. All written personnel policies were centrally formulated at the Highway Commission headquarters in Jefferson City, under the supervision of Chief Engineer Hunter. Implementation of these personnel policies was overseen by the central headquarters in Jefferson City under the supervision of Hunter, and Hunter had final responsibility to approve personnel policies, subject to the approval of the Missouri Highway & Transportation

Commission. A Personnel Committee appointed by Hunter adopted personnel policies, including hiring and recruitment policies to be included in the Personnel Management Manual, which is disseminated to each District.

26. All recommendations for hire for maintenanceman must be approved by Chief Engineer Hunter in the central office. Only Chief Engineer Hunter has the authority to hire. In each district of the Highway Commission the selection of an applicant for hire into any job position must be approved by the Maintenance & Traffic Engineer and then by the District Engineer before the recommendation is sent to Jefferson City for approval. The central office in Jefferson City maintains a personnel file on each employee of the Highway Department which includes a copy of the employee's application form. The Central Personnel Office also maintained a list of all females employed in the maintenanceman positions.

27. Robert Hunter personally noticed every recommendation to employ a female for maintenanceman that came across his desk because of the few number of women who had been recommended for hire.

28. District Eight used the uniform application for employment form known as the P-1 form which all applicants must file with the Commission to be considered for any job with the Commission. The centrally developed and uniformly disseminated Job Interview Evaluation Form (Form P-20) has been used in District Eight since January, 1977.

29. Effective June 1, 1980, the central headquarters imposed upon all districts a uniform hiring freeze prohibiting any new hires for maintenanceman positions. This freeze has since been lifted.

30. For each vacancy, the Personnel Division of the Missouri Highway & Transportation Commission assures itself that there is an authorized opening. Only the Highway Commission headquarters has the authority to au-

thorize the filling of job vacancies for the various job categories, including maintenanceman.

31. The Missouri Highway & Transportation Commission Form P-1, titled Application for Employment, is the standard application for employment used for entry maintenanceman positions in District Eight and has been since January 1, 1974.

32. Form P-1, Application for Employment, is completed and signed by all persons seeking employment with the Highway Commission pursuant to Policy 5000 of the Personnel Management Manual of the Missouri Highway & Transportation Commission. In District Eight after January 1, 1977, it was standard procedure for a P-20 interview form to be completed and to be attached to the applicant's application form.

33. The completed P-1 application forms are reviewed by employees of the Commission in the regular course of business and are retained in the District office.

34. The completed P-1 forms are retained as active applications for one year from the date on the application form pursuant to Policy 5000 of the Personnel Management Manual of the Highway Commission. Consequently, an applicant for maintenanceman is eligible to be considered for all vacancies which occur within one year after the application is filed. All applications for employment with the Highway Commission are deemed inactive one year after the date the application is filed with the Commission unless the applicant updates the application for employment.

35. Most persons interested in maintenanceman positions contacted the Highway Department directly rather than the Division of Employment Security.

36. As a result of the Highway Commission's failure to hire women, potential female applicants were discouraged from applying for the maintenanceman position. Moreover, there was at least one instance where High-

way Commission employees tried to discourage a female applicant by incorrectly advising her that the application could be obtained only in Springfield or Jefferson City, rather than at the maintenance shops near the applicant's home.

Hiring Process for the Maintenanceman Position

37. There were no females hired in District Eight for the maintenanceman position until after Jane Catlett filed her discrimination with the Equal Employment Opportunity Commission.

38. In District Eight of the Highway Commission, the maintenance foremen, maintenance area supervisors, and the maintenance superintendents screen, evaluate, and recommend for hire applicants for the maintenanceman position. During the relevant time period, all the persons occupying these job categories were male. No written or verbal guidelines on hiring procedure were communicated to the Highway Commission employees in District Eight who had authority to screen, interview, or recommend applicants for employment into the maintenanceman position. In the absence of effective guidelines, the persons charged with such authority were free to exercise their unrestricted discretion in screening and evaluating applicants for hire. As a result, the process of screening applications to select applicants to be interviewed for the maintenanceman position was arbitrary, subjective, and inconsistent.

39. Following the employment interviews, the foremen and area supervisors recommend an individual for hire to the Maintenance Superintendent, who then makes a recommendation to the District Maintenance and Traffic Engineer. The Maintenance and Traffic Engineer makes a recommendation to the District Engineer who gives final approval and then forwards the recommendation to the central office in Jefferson City. The Chief Engineer

must sign off on all recommendations and has actual notice as to the sex of the new hires for the maintenance position.

40. One of the qualifications for the position of maintenanceman is the ability to operate lightweight motor equipment. The application form used by District Eight employees to evaluate applicants, however, did not request that the applicant indicate relevant experience involving lightweight motor equipment. Although the application requested information concerning the applicant's past employment record and gave the applicant the opportunity to indicate training in areas such as carpentry, engine mechanics and heavy equipment operation, the application did not seek or provide the applicant with the opportunity to describe relevant experience acquired through non-paid farm and truck-driving experience. Numerous female applicants for the maintenanceman position had experience with lightweight motor equipment through non-paid or self-employed farm and trucking experience, but were not able to indicate this type of experience on the application form. Not all applicants for the position of maintenanceman were interviewed for the position, however, as some applicants were screened on the basis of information contained on the application form, or on the basis of the personal knowledge of the selecting official regarding a particular applicant. As a result of the failure of the application form to provide a space for the listing of unpaid experience or lightweight motor equipment experience, there was a reduced likelihood that these otherwise qualified female applicants would be selected for an interview.

41. The Highway Commisison and District Eight did not provide the interviewers with training or instruction concerning the interview and selection process, and there were no written guidelines established to regulate the interview procedure. As a result, different hiring standards were applied to female applicants than were applied to male applicants. For example, in evaluating applicants

for hire, interviewers in District Eight discounted farm experience of female applicants, and yet relied on the same type of farm experience in hiring male applicants. Similarly, the District Eight interviewers rated the work experience of female applicants as laborers, groundkeepers and road crew workers as unrelated to maintenance work, while males with similar experience were described by interviewers as having related experience.

In addition, distance requirements for the maintenanceman position were applied differently to females, as some female applicants who lived within twenty miles of a job vacancy were told that they did not live close enough for emergency duty, while some males who lived more than twenty miles from a vacancy location were interviewed and hired. Similarly, some highly qualified female applicants were not interviewed for vacancies near to where they lived, nor were they given an opportunity, unlike male applicants, to interview for vacancies for which they would have to move to be hired. Moreover, there were instances where District Eight officials interviewed female applicants who lived far from a job vacancy when there were active applications of females who lived close to the vacancy, and failed to interview the same women previously interviewed for vacancies near to where they lived.

Regarding those women who were interviewed, the interviewers discouraged several female applicants by asking questions in a manner indicating that the interviewers did not believe the applicant could handle the job, while the interviewers did not question male applicants in a similar manner. During the interviews, the interviewers repeatedly rejected the assertions of female applicants that they were willing and able to perform maintenanceman duties by making comments on the interview sheets such as "I am not sure that she would be satisfied although she strongly indicates that our work is what she is looking for," and "she applied for job as

flagman and might not be happy with routine maintenanceman duties even though she admitted willingness to try." The interviewers, however, accepted similar assertions by male applicants without expressing similar reservations.

As a result of the unregulated interview process, several employment decisions were made in District Eight that give rise to an inference of gender based discrimination. For example, a male applicant with clerical experience and no other related experience was hired as a maintenanceman, while a female applicant with clerical experience was rejected due to her lack of job experience and was encouraged to seek a clerical position. Similarly, a male applicant who lacked any type of experience with light motor equipment was hired as a maintenanceman in District Eight, while a female applicant with farm experience and who had operated a tractor and brush hog mower was considered for the same job but was not hired. A highly qualified female applicant was rejected ostensibly because of her frequent job changes, while males with more frequent job changes were hired as maintenancemen.

42. The employment interviews in District Eight for the maintenanceman position were conducted in settings which intimidated and discouraged female applicants, and were conducted in a manner to suggest that the female applicants were not seriously being considered for the jobs. There were numerous instances where District Eight interviewers emphasized the negative aspects of the maintenanceman position during the interview in order to discourage female applicants from pursuing their applications. The interviews of female applicants consistently included repeated references by the interviewers to the fact that one of the duties of the maintenanceman position was the removal of dead animals from the roads. The interviewers in District Eight also emphasized to the female applicants that there were no restroom facilities

for women to use while the maintenance crews were on duty, and that the job required long hours and involved dangerous activities in inclement weather. The interviews of male applicants, however, did not include similar emphasis by the interviewers of the undesirable characteristics of the maintenanceman position.

In addition, there were several instances where the interviews of female applicants in District Eight were not conducted in private rooms normally used for interviewing, but were done in open areas with large numbers of highway employees present who would hear and react to the interview. This practice inhibited and intimidated the female applicants, and a similar procedure was not used in the interviews of male applicants in District Eight. There were also instances where the interviewers tried to discourage female applicants by suggesting that the applicant's husband would become jealous if the applicant had to spend the night working on the road in emergencies with male maintenancemen, or by suggesting that the female applicant would be offended by the language of the male maintenancemen.

In a similar vein, female applicants for the maintenance positions in District Eight were reluctant to attend interviews because of telephone calls from interviewers who attempted to discourage the applicants by emphasizing the negative aspects of the job and by advising the applicants that another person was likely to be hired for the position. There were also instances where hiring officials in District Eight encouraged female applicants to pursue other jobs outside the Highway Commission.

The fact that female applicants in District Eight were not given serious consideration for employment is demonstrated by comments made by interviewers on the interview sheets regarding the physical attractiveness of female applicants and by undue emphasis given by interviewers to height and weight of female applicants in

failing to hire them. Interviewers attempted to discourage female applicants by telling the applicants that they were not strong enough or built right for the job. One interviewer disqualified female applicants who were "too feminine." Although female applicants were rejected ostensibly because they were too light weight, fifteen of the male applicants hired in District Eight from January, 1975 through May 31, 1980 weighed between 110-160 pounds. Similarly, although female applicants were rejected by District Eight because they were too small, fifteen of the male applicants hired in the relevant time period were between 5′5½″ tall and 5′8½″ tall.

43. Several female applicants testified at trial regarding their futile attempts to obtain employment as maintenancemen in District Eight. Patricia Leembruggen filed an application for employment with District Eight on March 25, 1975. Leembruggen was qualified for the maintenanceman position, as she was a high school graduate and had experience in operating lightweight motor equipment. Despite her qualifications, Leembruggen was not hired by District Eight, nor was she interviewed or even contacted for an interview. District Eight continued to accept employment applications for the maintenanceman position after Leembruggen filed her application for employment. The Highway Commission hired a male to begin employment as a maintenanceman on April 9, 1975, and hired ten males with qualifications similar to Leembruggen's during the year her application was active.

Similarly, Grace Tuter filed an application for employment with District Eight on June 14, 1976. Tuter was qualified for the maintenanceman position because she was a high school graduate at the time she applied for the position, and because Tuter had the ability to operate lightweight machinery as a result of her farm experience. Although Tuter was interviewed on October 15, 1976, she was not hired and was not considered for any maintenanceman vacancies subsequent to October 15, 1976.

Twenty-seven males with qualifications similar to those of Tuter were hired during the year following Tuter's application for employment.

Adeline Kallemyn filed her application for employment with District Eight on September 27, 1976, and was qualified for the maintenanceman position because she was a high school graduate and had the ability to operate lightweight equipment. Although Kallemyn was interviewed for a maintenanceman vacancy on September 27, 1976, and again on June 22, 1977, she was not hired. Numerous males, however, with qualifications similar to Kallemyn's were hired in District Eight for maintenance positions during the periods Kallemyn's application was active. During Kallemyn's interviews, interviewers focused on her appearance rather than her qualifications, downgraded Kallemyn's qualifications, and indicated that they did not believe she would be able to handle the undesirable aspects of the maintenanceman position.

On June 25, 1975, plaintiff Jane Catlett inquired at the Marshfield maintenance shed about a maintenanceman vacancy at the Conway Rest Area. Catlett was informed of his opening by the wife of James Coyle, Coyle was a mechanic employed by District Eight. At this time, District Eight had never hired a female to fill a maintenanceman position. Catlett talked to Robert Meyer, the area supervisor for the Marshfield shed, and was given an employment application. Although Meyer advised Catlett that there was no need for her to complete the application that day, Catlett promptly completed the application and returned it to Meyer at the maintenance shed early in the morning of June 26, 1975. When she returned the application form, Catlett asked Meyer questions concerning the employment process, but Meyer acted annoyed and refused to discuss her application, except to say that she was qualified and would be considered for the position, and that she would be contacted by the Highway Commission's office in Springfield.

Despite Meyer's assurances, Catlett was not interviewed nor was she contacted by District Eight concerning the Conway Rest Area vacancy. Later in the morning of June 26, 1975, Meyer went to the District Eight offices in Springfield, informed William Day, the maintenance and traffic engineer for District Eight, that a female had applied for the vacancy, and recommended that a male applicant, Robert Strickland, be hired for the position. On June 30, 1975, V.B. Unsell, the District Engineer for District Eight, filed a requisition form with the Highway Commission requesting approval to hire Strickland. This requisition was approved by Robert Hunter, Chief Engineer for the Highway Commission, on July 3, 1975, and Strickland began his employment on July 7, 1975.

Following the selection of Strickland, Meyer noted that Catlett had listed James Coyle as a reference in applying for the maintenanceman position. Thinking that Coyle had informed Catlett of the vacancy at the Conway Rest Area, Meyer became angry and confronted Coyle, telling Coyle that "you sent that bitch in here, and now I'm going to have to hire her."

The Highway Commission continued to accept applications for employment for entry maintenanceman positions after Catlett filed her application and, in addition to Robert Strickland, nine males were hired in District Eight into entry maintenanceman positions within one year after Catlett filed her initial application for employment. Catlett, however, was never hired for any position with the Highway Commission.

On March 20, 1976, Catlett filed a charge with the Equal Employment Opportunity Commission, alleging that the Highway Commission failed to hire her for a maintenanceman position because of her sex. The Highway Commission subsequently contacted Catlett and requested that she interview for a maintenanceman vacancy. Catlett attended the scheduled interview at the

Marshfield shed on June 22, 1977. At the interview, the District Eight hiring officials attempted to discourage Catlett from wanting to work for the Commission by emphasizing the negative aspects of the maintenanceman position, and by their reluctance to discuss the positive features and benefits of the job. The interviewers made no attempt to determine Catlett's qualifications for employment. Pursuant to the requests of the interviewers, Catlett verbally updated her prior application at the June 22 interview by describing her subsequent job experience, which included maintenance work at a restaurant and clerical work at a university. Catlett refused, however, to disclose the name of the university where she was employed because she was afraid she would lose her job. Although Catlett described the duties involved with her clerical work, the interviewers devoted the majority of the interview to expressing their disapproval of her failure to disclose the name of her employer, and warned Catlett that her refusal would be considered in the hiring decision. In addition, rather than being concerned with Catlett's ability to perform the duties required of the maintenanceman position, the comments of the interviewers on the interview sheet indicate that they were more concerned with what they perceived as flaws in Catlett's personal appearance. In June of 1978, at the request of the Highway Commission, Catlett submitted a written update of her original application.

Despite her apparent qualifications and her expressed interest in employment with the Highway Commission, Catlett was not hired by District Eight nor was she offered a job. During the period of time that Catlett's application for employment and supplements were active, there were more than thirty vacancies for the maintenanceman position in District Eight for which males were hired. Many of the males hired had qualifications similar or inferior to Catlett's qualifications. A review of the

conduct of the hiring officials in District Eight regarding the handling of Catlett's application and interview, as well as their haste in hiring a male applicant immediately after Catlett submitted her initial application, clearly demonstrates that the refusal of the Commission to hire Catlett was based on her sex. This finding is further supported by the subsequent hiring decisions made by the Commission while Catlett's application was still active. Furthermore, there was no credible evidence presented at trial to support the Commission's contention that Catlett was not hired because she failed to update her application in a timely fashion, and that she was not hired because other applicants were better qualified.

II. Conclusions of Law

Under Title VII, there are two separate but related theories available to prove a prima facie case of employment discrimination: disparate treatment and disparate impact. Disparate treatment "is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatement. Undoubtedly, disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15, 97 S.Ct. 1843, 1854 n.15, 52 L.Ed.2d 396 (1977). In *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), the Supreme Court established the allocation of proof governing an individual's claim of disparate treatment. The plaintiff may establish a prima facie case of discrimination in hiring by showing (1) that she was a member of a protected class; (2) that she applied and was qualified for a job for which the employer was seeking applicants; (3) that she was rejected for the position

despite her qualifications; and (4) that, after she was rejected, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. 411 U.S. at 802, 93 S.Ct. at 1824.

While the foregoing describes the general test to be applied in Title VII cases in determining whether the plaintiff has established a prima facie case of discrimination, "[t]he method suggested in *McDonnell Douglas* for pursuing this inquiry was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577, 98 S.Ct. 2943, 2949, 57 L.Ed.2d 957 (1978). The courts have recognized that the *McDonnell Douglas* test of a prima facie case is not capable of a literal application in every Title VII case, and that the proof required to demonstrate a prima facie case will vary with each factual situation. *Furnco Construction Corp. v. Waters*, *supra*, 438 U.S. at 575-76, 98 S.Ct. at 2949. Basically, the plaintiff is only required to "show actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a discriminatory criterion illegal under the Act.' " *Kirby v. Colony Furniture Co.*, 613 F.2d 696, 703 (8th Cir.1980) quoting *Furnco Construction Corp. v. Waters*, *supra*, 438 U.S. at 576, 98 S.Ct. at 2949.

By making a prima facie case of disparate treatment, a plaintiff raises an inference of "discriminatory animus because experience has proved that in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations." *Furnco Construction Co. v. Waters*, *supra*, 438 U.S. 567, 579-80, 98 S.Ct. 2943, 2951. The establishment of a prima facie case "creates a legally mandatory, rebuttable presumption of discrimination." *Jones v. International Pa-*

per Company and United Paperworkers International Union, 720 F.2d 496, 500 (8th Cir.1983). A prima facie showing, however, is not the equivalent of a factual finding of discrimination. *Furnco Construction Co. v. Waters*, *supra*, 438 U.S. at 579, 98 S.Ct. at 2951. "That is, the employer as a Title VII defendant does not have to prove absence of discriminatory motive to escape liability; a prima facie showing of disparate treatment shifts only the burden of producing evidence to the employer, not the burden of persuasion." *Kirby v. Colony Furniture Co., Inc.*, *supra*, 613 F.2d 696 at 702. The evidentiary obligation of the defendant "is limited to a burden of production." *Jones*, *supra*, 720 F.2d at 500. To dispel the adverse inference from a prima facie showing of disparate treatment, the employer need only articulate a legitimate, non-discriminatory reason for the plaintiff's treatment. *Furnco Construction Co. v. United States*, *supra*, 438 U.S. at 577-78, 98 S.Ct. at 2950. If the employer does articulate a justification reasonably related to the achievement of a legitimate goal, the plaintiff must show that the defendant's articulated reason is a mere pretext for discrimination. *McDonnell Douglas v. Green*, *supra*, 411 U.S. at 804, 93 S.Ct. at 1825. The burden of persuasion remains on the plaintiff, who must convince the trier of fact by a preponderance of the evidence that the challenged employment practice is discriminatory. *Kirby v. Colony Furniture Co., Inc.*, *supra*, 613 F.2d at 703.

In comparison, claims based on the disparate impact theory of employment discrimination involve employment practices that are "facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *International Brotherhood of Teamsters v. United States*, *supra*, 431 U.S. 324, 335-36 n.15, 97 S.Ct. 1843, 1854 n.15. To make a prima facie case on a disparate impact claim, a plaintiff need not show that the

employer had a discriminatory intent but need only demonstrate that the particular practice results in a discriminatory effect. *Furnco Construction Co. v. Waters*, *supra*, 438 U.S. at 583, 98 S.Ct. at 2952-53 (Marshall, J., dissenting). The plaintiff need only show that an employment practice operates to exclude a protected class in order to make a prima facie case of discrimination under a disparate impact theory. *Jones*, *supra*, 720 F.2d at 499. Once a plaintiff has established the disparate impact, the burden shifts to the employer to demonstrate that the practice has a manifest relationship to the employment in question. *Kirby v. Colony Furniture Co., Inc.*, *supra*, 613 F.2d 969, 703. If the employer proves that the challenged practices are justified by business necessity, the plaintiff may then demonstrate that other employment practices lacking a similar discriminatory effect would satisfy the employer's legitimate interest in efficient and trustworthy workmanship. *Id.*

Regarding claims of class-wide sex discrimination under Title VII, central to both the disparate treatment and disparate impact theories is the existence of "an identifiable employment pattern, practice or policy that demonstrably affects all members of a class in substantially, if not completely, comparable ways." *Stastny v. Southern Bell Telephone & Telegraph Co.*, 628 F.2d 267, 273 (4th Cir.1980). Under the disparate treatment theory, "this is the 'pattern or practice,' followed as an employer's 'regular or standard operating procedure,' which so demonstrably treats women in relatively unfavorable ways that justifies a rebuttable inference that it proceeds from an intention to treat them differently simply because of their sex." *Id. See Teamsters v. United States*, *supra*, 431 U.S. at 336, 97 S.Ct. at 1855. Under the disparate impact theory, it is the practive [sic] or policy which, "though demonstrably neutral or even benign in any sex-related intent, nevertheless bears with disproportionately adverse impact and without any jus-

tification of business necessity upon women." *Stastny v. Southern Bell*, *supra*, 628 F.2d at 273-74. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). To establish a class-wide pattern or practice of discrimination, a plaintiff must prove "more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts." *International Brotherhood of Teamsters v. United States*, *supra*, 431 U.S. 324 at 336, 97 S.Ct. at 1855. The plaintiff must establish by a preponderance of the evidence that discrimination was the employer's standard operating procedure—the regular rather than the unusual practice. *Id.*

A. THE CLASS CLAIMS

Statistical Evidence and the Prima Facie Case

Statistical evidence can serve as a useful tool in pattern and practice suits in the determination of whether defendants have engaged in employment discrimination. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). A plaintiff can utilize statistics to establish a prima facie case of disparate impact discrimination. *Royal v. Missouri Highway and Transportation Commission*, 655 F.2d 159, 162 (8th Cir.1981). Statistical evidence also is relevant to a claim of disparate treatment, and statistics showing a general pattern of discrimination are probative on the question of whether the reasons given for a particular action are pretextual. *Bauer v. Bailar*, 647 F.2d 1037, 1045 (10th Cir.1981). The significance of statistical evidence in a given case depends on the surrounding facts and circumstances. *International Brotherhood of Teamsters v. United States*, *supra*, 431 U.S. at 340, 97 S.Ct. at 1856.

In *Green v. Missouri Pacific Railroad*, 523 F.2d 1290 (8th Cir.1975), the Eighth Circuit identified three statistical methods of showing a disproportionate impact on

minorities. The first procedure considers whether a minority as a class is excluded by the employment practice in question at a substantially higher rate. *Id.* at 1293. The second procedure involves the use of actual applicant data, comparing the percentage of minority and non-minority applicants actually excluded by a challenged employment practice. *Id.* at 1294. The third procedure examines the level of minority employment by the employer in comparison to the percentage of minorities in the relevant geographic area. *Id.*

The statistical evidence presented in this case clearly establishes a prima facie case of employment discrimination. The plaintiffs' theory that the Highway Commission's word-of-mouth recruiting practices produced an abnormally small pool of female applicants is supported by the fact that there was a gross and statistically significant disparity between the number of women who actually applied for maintenanceman positions and the number of female applicants expected under the moderate and conservative definitions of the labor pool. Similarly, the plaintiffs' contention that the unregulated hiring procedure and the often hostile interview process resulted in the denial of employment opportunities to female applicants on account of their sex is illustrated by the statistically significant difference between the number of women hired for maintenanceman positions and the number of females expected to be hired, and by the disparity that existed in the static workforce. In addition, an examination of the number of males hired in each year compared to the number of females hired supports the conclusion that District Eight engaged in discriminatory employment practices. Although the Highway Commission's Chief Engineer issued a directive on the subject of minority employment in December, 1976, District Eight hired only two women out of fifty-five female applicants in 1977. Although there were 190 males and only two women employed as maintenancemen as of January 1,

1978, District Eight hired only five of the 120 females who applied during that year. In 1979, when six women were employed as maintenancemen at the start of the year, District Eight failed to hire any of the 88 women who applied.

Moreover, the statistical evidence also provides support for the plaintiffs' theory that the number of female applicants was lower due to the word-of-mouth recruiting practices of the Highway Commission. In 1975, when no women had been employed as maintenancemen by District Eight, there were only nine female applicants. In 1976, when the first female was hired as a maintenanceman by District Eight, the number of female applicants rose to sixteen. In 1977, two more women were hired and 55 females applied in District Eight. Similarly, in 1978, the number of women hired in District Eight reached a high of five, and the number of female applicants rose to its highest level at 120. In 1979, no females were hired in District Eight, and correspondingly, the number of female applicants dropped to 88. This parallel relationship between the number of women who were hired each year and the number of females who applied in the same year provides persuasive statistical support for the plaintiffs' contention that the word-of-mouth recruiting practiced by District Eight had an adverse effect on the number of women who applied and were hired for the maintenanceman position.

In rebuttal, the Highway Commission argues that there was no disparate impact because the Commission hired 2.6% of the female applicants between January 1, 1975 and May 31, 1980, while it hired only 2.5% of the male applicants during the same period. This argument is flawed, however, as it assumes that the applicant pool was not influenced by the Commission's recruitment and hiring process. A statistical showing of disproportionate impact need not be based on an analysis of the actual applicants, because "the application process itself might not adequately reflect the actual potential applicant pool,

since otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory." *Dothard v. Rawlinson*, 433 U.S. 321, 330, 97 S.Ct. 2720, 2727, 53 L.Ed.2d 786 (1977). *See also Donnell v. General Motors Corp.*, 576 F.2d 1292, 1298 (8th Cir. 1978). Even though the actual applicant data would indicate that there was no disproportionate impact, general population data (the first and third methods described in *Green*) can provide a basis for a showing of disproportionate impact. *Hammeed v. Intern. Ass'n of Bridge, Etc.*, 637 F.2d 506, 512 n. 6 (8th Cir.1980). "This is particularly the case where there is some threat to the validity of the actual applicant data." *Id.* In this case, the actual applicant data was affected by the Commission's hiring practices, and accordingly, the statistical evidence presented by the plaintiffs establishes at the very least a prima facie case of disparate impact.

Although a prima facie showing may in the proper case be made by statistics alone, it may also be established by a cumulation of evidence, including patterns, practices, general policies or specific instances of discrimination. *Equal Employment Opportunity Commission v. American National Bank*, 652 F.2d 1176, 1188 (4th Cir.1981). In this case, the Court is satisfied that the plaintiffs have met their burden of establishing a prima facie case on statistics alone, as the plaintiffs have shown that women not only were hired in District Eight in disproportioate numbers, but also that they applied in similarly disproportionate numbers. This is not, however, a case based solely on statistics. In addition to a substantial and convincing amount of relevant statistical evidence, plaintiffs have enhanced these statistics with direct evidence that the hiring officials in District Eight intentionally discriminated against women as part of a regular pattern and practice. This evidence includes the consistent use of interviews by hiring officials to discourage

and intimidate female applicants, the refusal on the part of the Highway Commission to promulgate objective guidelines to correct a hiring process that was known by the Commission to be discriminatory, and the purposeful failure on the part of the Commission to change its word-of-mouth recuiting policy that generated a disproportionately low number of female applicants. This evidence of discriminatory intent removes any question that the disparities established by the statistics arose merely as a matter of chance.

The Interviews of Female Applicants

Title VII requires that females must have equal employment opportunities, not merely that their applications, if any, be processed fairly. Internal employment practices which deny equal employment opportunity for women are in violation of Title VII. *Harless v. Duck*, 619 F.2d 611, 618 (6th Cir.1980). Discriminatory intent in the interview process may be shown by the interviewer's failure to give a female applicant serious consideration, and by interview questions which do not relate to a bona fide occupational qualification. *King v. N.H. Dept. of Resources & Economic Development*, 562 F.2d 80, 82-83 (1st Cir.1977).

In District Eight, the employment interviews for the maintenanceman position consistently were conducted in a manner designed to discourage and intimidate female applicants. The interviewers of female applicants regularly emphasized the negative aspects of the job by repeatedly referring to the fact that maintenancemen must remove dead animals from the road and to the fact that there are no restroom facilities available while the maintenance crews are on the road. In addition, the interviewers often conducted the interviews in a manner indicating they did not believe the female applicant could perform the duties required of maintenancemer, and often rejected the assertions of female applicants tha: they were

willing and able to perform the duties required. Unlike the male applicants who generally were interviewed in private rooms at the maintenance sheds, several female applicants were forced to take part in interviews conducted in open areas with numerous highway employees present, a practice which was designed to inhibit and intimidate the female applicants. The fact that these discussions and practices did not occur in the interviews of male applicants clearly demonstrates that the female applicants were not given serious consideration for employment.

These incidents occurred with such frequency in the interview process that there can be no doubt that it was the regular practice of the Highway Commission in District Eight to intentionally discriminate against female applicants. Accordingly, the plaintiffs clearly have made a prima facie showing of disparate treatment as a result of the interview process. In response to this showing, the Highway Commission has not articulated any legitimate reason justifying these interview practices. Instead, the Highway Commission merely denies that these practices ever occurred. This Court finds that the defendant has not rebutted the plaintiff's prima facie case of disparate treatment, and that in any event, even if such rebuttal evidence exists, the plaintiffs have established by a preponderance of the evidence that the employment interviews of female applicants by District Eight constituted a pattern and practice of intentional discrimination which denied the plaintiffs employment opportunities on account of their sex.

The Unregulated Hiring Process

In *Stewart v. General Motors Corp.*, 542 F.2d 445 (7th Cir.1976), the Seventh Circuit ruled that a promotion system which operated to exclude blacks was in violation of Title VII, and noted that the system was highly susceptible to abuse because supervisory recommendations

played an important role in the promotion process. The Court observed that no written guidelines were established to delineate relevant criteria for promotion, and that the foremen who had to make the recommendations, most of whom were white, had no objective method of evaluating the employees. The Court in *Stewart* felt that such a process totally lacking objective standards "could only reinforce the prejudices, unconscious or not, which Congress in Title VII sought to eradicate as a basis for employment." *Id.* at 450. Similarly, in *United States v. Hazelwood School District*, 534 F.2d 805 (8th Cir.1976), the Eighth Circuit held that a prima facie case of a pattern or practice of employment discrimination existed where there was statistical evidence showing a disparity between the proportion of blacks in an employer's workforce and the relevant labor market, and where the employer's hiring procedures involved the use of vague and subjective criteria. *Id.* at 813. The lack of objective guidelines for hiring and promotion and the failure to post notices of job vacancies are badges of discrimination. *Brown v. Gaston County Dyeing Machine Co.*, 457 F.2d 1377, 1383 (4th Cir.1972). Likewise, in *Rowe v. General Motors*, 457 F.2d 348 (5th Cir.1972), a promotion system was found to be in violation of Title VII because it contained the following features: (1) the foreman's recommendation was an indispensable factor in the promotion process; (2) the foremen were given no written instructions pertaining to the qualifications necessary for promotion; (3) the standards which were controlling were vague and subjective; and (4) there were no safeguards in the procedure designed to avert discriminatory practices. *Id.* at 358-59.

In the present case, the unregulated interview process used by the Highway Commission in District Eight was highly susceptible to discriminatory hiring decisions. In District Eight, the recommendations of the maintenance foremen, area supervisors and superintendents played a

critical role in the hiring decisions. No effective written or verbal guidelines on hiring procedure were established by the Highway Commission or by District Eight, and as a result, the interviewers had no objective criteria to delineate the factors relevant to the hiring decision. The interviewers, all of whom were male, were free to exercise their unlimited discretion in evaluating applicants for hire. Even the application form used by District Eight was insufficient, as it failed to provide the interviewers with relevant information concerning the applicant's ability to operate lightweight motor equipment, which was one of the necessary qualifications for the maintenance-man position.

Due to the absence of guidelines to regulate the selection process, the hiring decisions in District Eight were arbitrary and subjective, and as a result, hiring standards that were applied to female applicants were not the same as those applied to males. For example, the interviewers discounted the farm and labor experience of some female applicants, while male applicants with similar experience were considered to be qualified by the interviewers. Similarly, the requirement that prospective employees live within twenty miles of the maintenance shed was applied more strictly to female applicants. Likewise, a female applicant's lack of size often was considered by the interviewers to be a reason not to hire, while males of similar size were hired by the Commission. One of the most damaging results of the unregulated hiring process clearly was the practice of using the interviews to discourage female applicants.

Highly probative evidence of the intentional discrimination by the Commission is the fact that as early as 1976, both the Commission and District Eight were aware of the urgent need to avoid discriminatory hiring practices regarding female applicants. Although the Commission was aware of this responsibility, and cog-

nizant of the lack of female employees in District Eight, it took no steps to insure that the requirements of Title VII were obeyed and knowingly failed to promulgate any guidelines to regulate the hiring process.

In *Harris v. Ford Motor Co.*, 651 F.2d 609 (8th Cir. 1981), the Eighth Circuit recognized that a subjective system of evaluation cannot alone form the foundation for a discriminatory impact case. *Id.* at 611. The Court in *Harris* also recognized, however, that a non-objective evaluation system may be probative of intentional discrimination, especially when discriminatory patterns result, "because such systems operate to conceal actual bias in decisionmaking." *Id.* Similarly, the Eighth Circuit has recognized that "a case of disparate treatment may be proven where employment decisions are made by supervisors subjectively without definite standards for review, and the decisions resulting in a pattern disfavoring minorities or females." *Satz v. ITT Financial Corp.*, 619 F.2d 738, 746 (8th Cir.1980).

In light of the evidence demonstrating a pattern of discrimination against female applicants in District Eight, this Court finds that the Commission's knowledge that the promulgation of guidelines was necessary to avoid discriminatory results, coupled with its failure to regulate the hiring process in District Eight, constituted a prima facie showing of intentional employment discrimination. The Commission has not rebutted the plaintiffs' prima facie showing, as it has not articulated any legitimate reason justifying the unregulated hiring process. Moreover, even if such a reason were articulated by the Commission, the Court concludes that the plaintiffs have established by a preponderance of the evidence that the unregulated hiring process used by District Eight constituted a pattern and practice of intentional discrimination which denied the plaintiff's employment opportunities on account of their sex.

Word-of-Mouth Recruiting

Although it is clearly established that Title VII does not require that an employer give preferential treatment to minorities or women or that an employer restructure his hiring practices to maximize the number of minorities and women hired, *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 259, 101 S.Ct. 1089, 1096-97, 67 L.Ed.2d 207 (1981), evidence of intentional discrimination may be based upon a history of minimal recruiting efforts in publicizing job vacancies and openings. *Rogers v. International Paper Co.*, 510 F.2d 1340, 1345 (8th Cir. 1975). "The passive nature of past recruitment together with the failure to undertake affirmative recruitment efforts after the passage of Title VII may justify a finding of discriminatory conduct." *Id.* The practice of word-of-mouth recruiting, where employment depends primarily upon being referred to the company by an existing employee, has been determined to operate in a discriminatory manner against blacks. *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421, 427 (8th Cir. 1970). In *Parham*, the Eighth Circuit stated that where an employer's work force is almost completely white, "it is hardly surprising that such a system of recruitment produced few, if any, black applicants. As might be expected, existing white employees tended to recommend their own relatives, friends and neighbors, who would likely be of the same race." *Id. See also United States v. N.L. Industries, Inc.*, 479 F.2d 354, 368 (8th Cir. 1973). Although word-of-mouth recruitment is a practice that may be neutral on its face, the procedure often operates adversely against minorities, and is not often justified by business necessity. *United States v. Georgia Power Company*, 474 F.2d 906, 925 (5th Cir.1973).

In the present case, nearly all of the hiring of maintenancemen in District Eight resulted from word-of-mouth recruiting. Although the Highway Commission was aware that few women were applying in District Eight,

the Commission made no effort to publicize job vacancies. The statistical evidence supports the plaintiffs' theory that the word-of-mouth recruiting had an adverse effect on the number of female applicants, as the number of females who applied increased as the number of female hires increased, and the number of female applicants decreased when the number of females hired decreased. As was similarly noted by the Eighth Circuit in *Parham*, it is not surprising that this type of recruitment produces few female applicants, as it should be expected that the male employees in District Eight usually would inform only their male relatives and friends of the maintenanceman vacancies. Accordingly, the Court finds that the word-of-mouth recruiting process used by District Eight as its standard operating procedure, although neutral on its face, resulted in a disproportionate effect on the number of females who applied and who were hired. The Highway Commission has presented no evidence, nor does it contend, that this practice has a manifest relationship to employment. Furthermore, the Court concludes that the plaintiffs have clearly established that word-of-mouth recruiting of District Eight constituted a pattern and practice of employment discrimination resulting in an adverse impact on the plaintiffs.

B. THE INDIVIDUAL PLAINTIFFS

The Highway Commission argues that plaintiffs Kallemyn, Tuter and Leembruggen cannot stand as individual plaintiffs in this action because they failed to file charges of discrimination with the Equal Employment Opportunity Commission. Although the Commission concedes that these plaintiffs are members of the class, the Commission nonetheless contends that this Court lacks jurisdiction over their individual claims. In *Allen v. Amalgamated Transit Union Local 788*, 554 F.2d 876 (8th Cir. 1977), however, the Eighth Circuit held that not every original plaintiff in a multiple-plaintiff, non-

class action suit must file charges with the E.E.O.C. In *Allen*, although only two of fifteen plaintiffs had filed charges with the E.E.O.C., the Court concluded that all fifteen plaintiffs were entitled to assert claims for back pay and seniority. *Id.* at 882-83. The court in *Allen* noted that the thirteen additional plaintiffs alleged facts demonstrating that they were similarly situated and had received the same discriminatory treatment as the plaintiffs who had filed E.E.O.C. charges. According to *Allen*, under such circumstances, "particularly where the discrimination is continuing, it would be nonsensical to require each of the plaintiffs to individually file administrative charges with the E.E.O.C. Defendants have in no way been placed in jeopardy." *Id.* In the present case, the allegations and the evidence clearly establish that the three individual plaintiffs are similarly situated and have received the same discriminatory treatment as Jane Catlett. All of the individual plaintiffs have demonstrated that they have deen denied employment opportunities as a result of the same recruiting and hiring procedures used by the Highway Commission, and, accordingly, this Court has jurisdiction over their individual claims in light of the Eighth Circuit's ruling in *Allen*. *See also Crawford v. United States Steel Corp.*, 660 F.2d 663, 665 (5th Cir. 1981).

An examination of the evidence in this case reveals that each of the named plaintiffs, Catlett, Tuter, Leembruggen and Kallemyn, has established a prima facie case of discrimination in hiring. Each individual plaintiff has demonstrated that she applied for and was qualified for the maintenanceman position, that she was rejected for the position despite her qualifications, and that after she was rejected, the position remained open and the employer continued to seek applicants from persons of the plaintiff's qualifications. Accordingly, the establishment of the prima facie case shifts the burden of production to the Highway Commission to articulate a legitimate, non-discriminatory reason for the plaintiff's treatment.

In response, the Highway Commission argues that Catlett, Kallemyn and Tuter were not hired because other applicants with better qualifications were hired. The Highway Commission also contends that Catlett was not hired because she refused to update her application in 1977, and because she failed to respond in a timely manner to the Highway Commission's request for an interview in 1978. Regarding Leembruggen, the Highway Commission does not advance any non-discriminatory reason for its failure to hire, and suggests only that there was no proof that the Commission discriminated against her. In considering the Commission's rebuttal arguments, the Court is aware that an employer does not have to prove the absence of discriminatory motive in order to successfully respond to the plaintiff's prima facie case; rather, the employer need only produce evidence articulating a legitimate, non-discriminatory reason for the plaintiff's treatment. Viewed in light of these standards, the Commission has met this burden with respect to plaintiffs Catlett, Kallemyn, and Tuter, but has not rebutted the prima facie showing of Leembruggen. The Court is convinced, however, that the reasons articulated by the Highway Commission are pretextual, and that the preponderance of the evidence establishes that each of the four named plaintiffs was subject to discriminatory treatment which resulted in gender-based denial of employment opportunities.

During plaintiff Kallemyn's interviews, the interviewers downgraded her qualifications, focused more on her appearance, and expressed their belief that she would not be able to handle the negative aspects of the maintenanceman position. Despite the Commission's contention that better qualified applicants were hired for the three positions for which Kallemyn was considered, there were numerous vacancies during the period of time Kallemyn's application was active which were filled by male applicants who did not possess qualifications superior to Kallemyn's. Similarly, during the period of time Leembrug-

gen's application was active, ten males with qualifications similar to hers were hired. Likewise, twenty-seven males with qualifications similar to those of Grace Tuter were hired during the year following her application.

A review of the circumstances surrounding Jane Catlett's experiences with District Eight clearly demonstrates that the reasons articulated by the Commission for not hiring her are mere pretexts for its discriminatory conduct. On June 25, 1975, Jane Catlett inquired at a Marshfield shed about a vacancy which the Commission was about to fill. Although a hiring decision was to be made in the near future, the area supervisor tried to deceive Catlett by telling her that there was no need for her to complete the applications promptly. Nonetheless, Catlett completed the application and returned it to the shed early the next day. When Catlett returned the application, the area supervisor was uncooperative and refused to discuss Catlett's application with her. Later that morning, the supervisor drove to the district offices in Springfield, advised the maintenance and traffic engineer that a female had applied for the vacancy, and recommended that a male applicant be hired for the position. Catlett was not hired for this opening, nor was she interviewed for it, and during the year that her application was active, nine males were hired in District Eight with qualifications similar to Catlett's.

It was not until after Catlett filed a charge of discrimination with the E.E.O.C. that she was contacted for an employment interview. At the interview, the hiring officials tried to discourage Catlett from pursuing employment with the Commission by their emphasis of the negative aspects of the job and by their reluctance to discuss the job's benefits. At the interview, the interviewers were more concerned with Catlett's personal appearance than with her qualifications. Finally, during the time periods Catlett's application and supplements were active, there were more than thirty vacancies, for which numerous

male applicants were hired with qualifications similar or inferior to Catlett's.

A careful review of the evidence in this case clearly establishes that plaintiffs Catlett, Tuter, Leembruggen and Kallemyn each have shown that they were intentionally denied employment opportunities on account of their sex. Just as the class members were subjected to a pattern of discrimination resulting from the biased interview process and the unregulated hiring procedure, similarly, these plaintiffs were the individual victims of the same practices.

In conclusion, this Court finds that the Missouri State Highway Commission, through its hiring policies, has engaged in a practice of discrimination against female applicants for the maintenanceman position. It is a serious matter when any employer engages in employment discrimination, but it seems particularly grave for the State to practice discrimination against its own citizens, as these are the people who pay the taxes that support and maintain the government, and whom the elected and appointed officials are to serve. It is distressing and demeaning that a branch of the Missouri state government should be guilty of unlawful discrimination against its own citizens.

Accordingly, it is hereby

ORDERED that judgment be entered in favor of the class and against the Missouri State Highway Commission on the Title VII class action claim. It is further

ORDERED that judgment be entered in favor of plaintiffs Jane Catlett, Adeline Kallemyn, Grace Tuter and Patricia Leembruggen and against the Missouri State Highway Commission on the individual Title VII claims. It is further

ORDERED that within fifteen (15) days of the date of this order, the parties are to submit a discovery schedule regarding the relief and damages stage of this litigation.

APPENDIX C

UNITED STATES DISTRICT COURT
W.D. MISSOURI, C.D.

No. 78-4061-CV-C-5

JANE CATLETT, individually and on behalf of all others similarly situated, PATRICIA LEEMBRUGGEN, GRACE TUTER, AND ADELINE KALLEMYN,

Plaintiffs,

v.

MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION, ROBERT N. HUNTER, Chief Engineer of Missouri Highway & Transportation Commission; V. B. UNSELL, District Engineer for District 8 of Missouri Highway & Transportation Commission,

Defendants.

Aug. 26, 1986

Lisa S. Van Amburg, St. Louis, Mo., Karen Plax, Kansas City, Mo., for plaintiffs.

John H. Gladden, Mo. Highway & Transp. Com'n, Joplin, Mo., Paula Lambrecht, Asst. Counsel, Mo. State Highway & Transp. Com'n, Jefferson City, Mo., for defendants.

ORDER

SCOTT O. WRIGHT, Chief Judge.

Pending before the Court are two issues left to be resolved in this case. First is the issue of damages under the 42 U.S.C. § 1983 count against the Highway Com-

mission. At the trial in September, 1983, the jury returned verdicts in favor of the class and against the Highway Commission. The question is whether the doctrine of sovereign immunity precludes such damages under § 1983. The plaintiffs have presented no persuasive authority to challenge the defendants' position that they are immune from monetary damages. However, this immunity does not extend to equitable or injunctive relief. *Wood v. Strickland*, 420 U.S. 308, 314 n. 6, 95 S.Ct. 992, 997 n. 6, 43 L.Ed.2d 214 (1975); *Hoohuyli v. Ariyoshi*, 741 F.2d 1169, 1176 (9th Cir.1984). Since the Court has already ordered injunctive relief under Title VII in this case, any relief under § 1983 would mirror what has been set out in the Court's order of December 13, 1985.

Secondly, plaintiffs have submitted their calculations of back pay based on the *Hameed* formula followed by this Court in its December 13, 1985 order. *See Hameed v. Ironworkers*, 637 F.2d 506 (8th Cir.1980). The defendants reviewed this submission and chose not to make any response. Accordingly, it is hereby

ORDERED that the individually named plaintiffs are awarded the following amount of back pay:

Jane Catlett	$ 78,189.77
Patricia Leembruggen	123,923.18
Adeline Kallemyn	105,245.82
Grace Tuter Shelley	108,930.95

It is further

ORDERED that the following class members are awarded back pay in the following amounts:

1. For the sub-class of 1975, each shall receive $41,747.31:

Martha Patton
Evelyn Young

2. For the sub-class of 1976, each shall receive $73,356.39:

Glenda Bond
Rosalee Habermehl
Rebecca McCrown
Theresa Marshall
Patricia Martone

3. For the sub-class of 1977, each shall receive $22,314.50:

Lucy Anderson
Joyce Bass
Cynthia Benner
Rebecca Cook
Georgia Eddington
Lori Etherton
Diane Gaehle
Melinda Gottas
Ethel Hirsch
Gerry Johnson
Margaret Johnson-Wood
Sonna Jones
Edith Kelly
Virginia Means
Sheree Moran
Jackie Nelson
Shirley Nelson Butts
Goldie Potter
Delores Powers
Brenda Smith
Betty Spitler
Brenda Storie
Audrey Sturdefant
Rebecca Swindall
Vickie Wand
Cheryl Young

4. For the sub-class of 1978, each shall receive $5,882.57:

Andrea Anderson
Beatrice Ash-Thomas
Norma Auslam
Nancy Baker
Connie Baldwin
Sally Lou Bates
Sarah Baumgartner
Sherry Biggs
Betty Jo Booher
Jean Bray
Nancy Cameron
Sandra Churchill
Sharon Claspill
Louise Cromwell
Marla Cypret
Janet Daniels
Verla Daugherty
Lucinda Dennis
Katherine Duncan
Karen Faulkner
Sharon Grant
Sally Graves
Karen Hall
Cheri Haney
Leona Hankins
Cleta Harris
Judy Hayes
Veta Hood
Shirley Hosier
Darra Justice
Myrna Kimberling
Lois Ludwig
Jean McClellan
Jane Mast
Delores Merrill
Rose Middaugh

Sandy Miller
Nancy Murray
Jo Myers
Loretta Nelson
Joetta Newman
Shirley Jones
Janice Perry
Sharon Pierson
Patricia Pigorsch
Janet Plemmons
Linda Radford
Lynn Roth
Janet Rowden
Vicki Rufer
Phyllis Schofield
Michelle Sheldon
Delilah Shobe
Marideth Sisco
Mary Ellen Smith
Sandra Startzman
Frances Stiebel
Anna Stokes
Sherry Stone
Connie Stroud
Linda Van Stavern
Bonnie Warner
Beverly Welch
Linda Jo Willis
Debbie Wolfe

5. For the sub-class of 1979, each shall receive $9,041.90:

Jo-Ann Bartley
Cindy Bass
Henrietta Bellamy
Jan Lynn Berg
Elizabeth Boehm
Terry Bonds

Christi Carney
Karen Cordova
Deborah Cox
Tammy Cross
Janice Crumpley
Betty Davison
Sharon Doran
Judy Dumback
Joyce Earls
Mary Eldringhoff
Cindy Emery
Candance Gentry
Becky Jo Goad
Billie Guerra
Jerri Hill
Clara January
Pamela Joliff
Karen McKenzie
Virginia McMillin
Cheryl Main
Ricki Martinetti
Gala Minor-Carrier
Donna Muffitt
Sheila Potter
Pixie Rippy
Roxie Rosenbaum
Tamra Russell
Sharon Stafford
Cynthia Taylor
Carla Trowbridge
Connie Tyler
Kathy Van Zandt
Janet Whitlock

6. For the sub-class of 1980, each shall receive $2,838.76:

Lynn Bennett
Sharon L. Clark
Dee Davis

Brenda Smith-Dixon
Debra Everitt
Kimberly Meier
Lauren Minkler
Kelly Ormsby
Glenda Peak
Deborah Pippin
Janet Tower
Jody Williams
Linda Jo Willis
Susan Yowell

It is further

ORDERED that this award of back pay shall be stayed pending appeal to the Eighth Circuit. However, the injunctive relief as set out in the December 13, 1985 order is not stayed and should be immediately implemented, if defendants have not already done so. It is further

ORDERED that monetary damages under § 1983 are denied, but injunctive relief is granted, to mirror that already ordered by this Court.

APPENDIX D

UNITED STATES DISTRICT COURT
W.D. MISSOURI
CENTRAL DIVISION

No. 78-4061-CV-C

JANE CATLETT, *et al.*,
Plaintiffs,

v.

MISSOURI STATE HIGHWAY COMMISSION, *et al.*,
Defendants.

Dec. 13, 1985

Lisa Van Amburg, Karen Plax, Raytown, Mo., for plaintiffs.

John Gladden, Asst. Counsel, Paula Lambrcht, Asst. Counsel, Missouri Highway & Transp. Com'n, Jefferson City, Mo., for defendants.

ORDER

SCOTT O. WRIGHT, Chief Judge.

This is a class action sex discrimination case brought pursuant to 42 U.S.C. § 1983 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* The Court previously ordered the suit to be severed into separate trials on the issues of (a) liability and (b) prospective equitable relief, monetary damages and attorneys' fees. In its order of December 5, 1983, the Court found defen-

dants liable under Title VII for sex discrimination against the four individually-named plaintiffs for failure to hire them as maintenance crew members, and liable for sex discrimination against the class in recruitment and hiring since 1975. *Catlett v. Mo. Highway & Transp. Com'n*, 589 F.Supp. 929 (W.D.Mo.1983) (Catlett I).

Pending before the Court are the parties' motions for summary judgment on various issues concerning remedial relief pursuant to Title VII. There is no genuine issue as to the following material facts, and so under Fed.R.Civ. P. 56 summary judgment is appropriate on the following specified issues.

I. TITLE VII MONETARY RELIEF

A. *Back Pay for Individually-named Plaintiffs*

Defendants argue that because the jury verdict was adverse to the four named plaintiffs on this § 1983 claim, remedial relief for those plaintiffs would be improper. For two reasons, the Court disagrees.

First, the defendants have not previously raised this issue of collateral estoppel. Thus, the Court is faced with the identical problem presented to the Eighth Circuit in *Goodwin v. Circuit Court of St. Louis County, Mo.*, 729 F.2d 541, 549 n.11 (8th Cir. 1984). There, as here, "counsel for all parties seem to have assumed that the court would make its own finding on the issue of discrimination, whichever way the jury verdict went on the § 1983 case." In *Goodwin* the court refused to apply res judicata against the Circuit Court. Defendants also cite *Brooks v. Carnation Pet Food Company*, No. 84-6105-CV-SJ-6 (W.D. Mo., Sept. 17, 1985) in support of their proposition. However, Judge Sachs distinguished the *Goodwin* case by noting that defendant Carnation Pet Food Company had raised the argument that the court is bound by estoppel in its proposed conclusions of law.

Id. at slip op. 4 n. 3. In the present case, defendants' proposed conclusions of law failed to raise this issue.

Secondly, even if defendants had timely raised this issue, remedial relief would still be appropriate. In *Brooks*, *supra*, the plaintiff's Title VII theory was one of disparate treatment, so the burden of establishing *intentional* discrimination was identical to that under § 1981. In the present case, the Court found evidence not only of disparate treatment but also disparate impact,[1] for which no intent need be established. Therefore, even if defendants' verdict on the § 1983 claim precluded a disparate treatment claim, the disparate impact claim would not be affected, and relief would be appropriate. Calculation of back pay is discussed *infra*.

B. *Back Pay for Class Members*

Excluding the individual plaintiffs, there are 161 claimants who seek back pay. Defendants seek to disqualify a number of class members on five different grounds: (1) lacked lightweight equipment experience; (2) lacked a valid Missouri driver's license; (3) stated no discrimination against them; (4) stated would not have accepted a job in maintenance had she been offered one; (5) no vacancies occurred within 20 miles of residence. During the remedial stage, the burden of proof is on defendants to demonstrate that individual applicants were denied employment for lawful reasons. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 362, 97 S.Ct. 1843, 1868, 52 L.Ed.2d 396 (1977).

In *Catlett I*, *supra* at 933, the Court made a finding of fact that the basic requirements for initial hire into the maintenance job are an eight-grade education and

[1] "Just as the class members were subjected to a pattern of discrimination resulting from the biased interview process and the unregulated hiring procedures, similarly, these plaintiffs were the individual victims of the same practices." *Catlett I*, *supra* at 949.

an ability to operate lightweight motor equipment. Plaintiffs concede that ten of the class members did not list such experience on their claim forms, but wish to add new information by affidavit at this time. The Court finds it would be inappropriate to consider this additional evidence. Therefore, the following class members were not qualified applicants and not entitled to relief:

Bailey, Aughty L.
Buehler, Staci L.
Farris, Debra
Fowler, Debbie J. (Rodriquez)
Garrett, Jayne L. (Warren)
Lyons, Debbie J. (Deprender)
Maxwell, Lorenzo P.
Meyer, Paula (Fannon)
Rodgers, Janet L.
Stewart, Brenda

The Court finds the remainder of defendants' attempts at disqualification to be specious. An applicant could readily obtain a Missouri driver's license, or if offered a job could relocate to live closer to the job site. Calculation of back pay for the remaining 151 members is discussed *infra*.

C. *Calculation of Back Pay*

1. *Fringe benefits of mitigation*

Plaintiffs are entitled to a back pay award pursuant to 42 U.S.C. § 2000e-5(g). In light of Title VII's policy to make whole a victim of discrimination, the award of back pay should include not only the straight salary, but raises and fringe benefits as well. *Rasimas v. Michigan Dept. of Mental Health*, 714 F.2d 614, 626 (6th Cir. 1983); *Meyers v. I.T.T. Diversified Credit Corp.*, 527 F. Supp. 1064, 1070 (E.D. Mo. 1981). Fringe benefits should include sick leave, vacation pay, pension benefits and any other benefits the claimants should have received but for the discrimination.

Additionally, under § 2000e-5(g), the claimants' interim earnings are to be deducted from the awarded back pay. Fringe benefits should likewise be deducted as interim earnings. Defendants argue that unemployment benefits or workmen's compensation should also be deducted. However, such benefits have been deemed by the Court to be a collateral source, and should not be deducted. *Donovan v. George Lai Contracting, Ltd.*, No. 84-4154-CV-C-5 (W.D. Mo. July, 1985). *See also Craig v. Y & Y Snacks*, 721 F.2d 77, 83 (3rd Cir. 1983); *Rasimas, supra* at 627.

Thus, for the individually-named plaintiffs, each should be awarded back pay and lost fringe benefits from the date she was deprived of the use of those monies when the Highway Department hired a comparable male in her place. This amount will then be offset by that plaintiff's actual earnings and fringe benefits during the same time period.

2. *Formula for Class Members*

All parties agree that class-wide relief would be most appropriate in this case as explained in *Hameed v. Ironworkers*, 637 F.2d 506 (8th Cir. 1980). However, the *Hameed* formula, *id.* at 520, must be adapted in this case to account for the discriminatory recruitment process. In its earlier findings of fact, *Catlett I*, 589 F. Supp. at 934, the Court determined the expected number of female hires for the years 1975-79. The Court presented figures for both a moderate and conservative definition of women expected to be hired.[2] While defendants argue it would

[2]

	Total Hires	Females Hired	Expected Hires, Conservative Definition	Expected Hires, Moderate Definition
1975	8	0	3	4
1976	22	1	8	10
1977	23	2	8	11
1978	26	5	9	12
1979	16	0	6	8

be punitive to apply anything but the conservative definition, the Court finds that the moderate definition would best fulfill Title VII's statutory purpose of making persons whole for injuries suffered through past discrimination. Therefore, back pay calculations will be based on thirty-eight vacancies.[3] From these figures, the number of females actually hired should be subtracted, to equal the number of vacancies for which back pay must be calculated.

The next step is to assign the 151 remaining class members to subclasses based upon the year in which they applied for maintenance crew member positions. The number of vacancies for that year will be multiplied by the amount of money those positions would have yielded to date,[4] less the *average* interim earnings (as opposed to the highest interim earnings) of those class members during the relevant time period. The money will then be divided equally among the members of that year's subclass.

3. *Pre-judgment Interest*

Plaintiffs contend they should be granted an award of pre-judgment interest on any award of back pay and fringe benefits. Plaintiffs cite numerous cases where this Court and others have used their discretion to allow pre-judgment interest.[5] However, all these cases deal with private sector employers, not the government as employer. The general rule when claims against the govern-

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[3] This includes one additional expected female hire during the period of January 1-May 31, 1980.

[4] The Court rejects defendants' argument of calculating the earnings of initial hires only. Instead, calculations will be based on vacancies; therefore, initial plus successive hires will be calculated.

[5] *Parson v. Kaiser Aluminum*, 727 F.2d 473 (5th Cir. 1984); *EEOC v. Wooster Brush Co.*, 727 F.2d 566 (6th Cir. 1984); *Washington v. Kroger Co.*, 671 F.2d 1072 (8th Cir. 1982); *U.S. v. Lee Way Motor Freight*, 625 F.2d 918, 919 (10th Cir. 1979).

ment are involved is that interest is proscribed absent express statutory or contractual authorization. *Saunders v. Claytor*, 629 F.2d 596, 598 (9th Cir.1980).

Plaintiffs cite no state or federal statute authorizing prejudgment interest. They do argue that, under 42 U.S.C. § 2000e-16, when Congress extended Title VII benefits to public employees, Congress intended them to receive the same rights as extended to private sector employees. *See Chandler v. Roudebush*, 425 U.S. 840, 841, 96 S.Ct. 1949, 1950, 48 L.Ed.2d 416 (1976). However, numerous courts have since interpreted this section *not* to include the right to pre-judgment interest. *Saunders v. Claytor, supra*, at 598; *Blake v. Califano*, 626 F.2d 891, 893 (D.C.1980); *Richerson v. Jones*, 551 F.2d 918, 925 (3rd Cir.1977).

While neither party has cited a case directly on point where interest was granted or denied in a Title VII case against a state agency as employer, defendants' argument is more persuasive since the state is clearly more analogous to the federal government than to private sector employers. Therefore, the Court finds that "other equitable relief" as authorized by 42 U.S.C. § 2000e-5 does not include pre-judgment interest.

4. *Special Master*

While plaintiffs contend a special master should be appointed to compute the back pay award, defendants believe such computation should be relatively easy once the Court has ruled on the necessary elements. In light of this order's rulings, plaintiffs should submit their calculations for back pay to the Court. Defendants will have an opportunity to object to any of the calculations, and if there are disagreements, then a special master may be appointed at that time.

II. INJUNCTIVE RELIEF

While defendants argue that their voluntary efforts in changing their hiring practices are enough to preclude additional affirmative relief, the Court finds the long history of discrimination and the comparatively short history of attempts to end such discrimination warrant further measures in the following respects:

(1) The Court will retain jurisdiction until January 1, 1990, to monitor the implementation of this order and to require additional specific action, if necessary, to eradicate any remaining discrimination;

(2) Between the date of this order and January 1, 1990, the Missouri Highway and Transportation Commission shall comply with a hiring plan, attached to this order as Appendix A, the goal of which is to generate an actual pool of female applicants for maintenance jobs in District 8 of between 37%-48%, and to fill 37%-48% new vacancies for maintenance jobs in District 8 with women;

(3) To remedy the Highway Commission's discriminatory recruitment policy, the title of the job category shall be changed from maintenanceman to reflect a job available to females as well as males. The Highway Department shall cease to utilize "word-of-mouth" or "walk-in only" recruitment, and instead implement recruitment literature and practices as set out in Appendix B, attached to this order.

(4) The Highway Commission shall develop a new application form which seeks relevant, non-discriminatory information from applicants and which incorporates the changes as set out in Appendix C, attached to this order;

(5) New procedures for interviews and the training of interviewers shall be implemented, as set out in Ap-

pendix D, attached to this order, to facilitate a non-discriminatory process for hiring;

(6) Those claimants who still seek employment as maintenance crew members shall be placed on a preferential hiring list. The first available vacancy at a particular maintenance shed shall be offered to the earliest applying claimant who would accept employment at that shed, and so on until the list of eligible claimants who seek employment is exhausted. Once a claimant turns down an offer of employment for any reason, she shall drop off the preferential hiring list, but may be considered for future employment.

III. CONCLUSION

In light of the foregoing, it is hereby

ORDERED that defendants' motion for summary judgment is granted with respect to:

(1) disqualifying those class members who did not list lightweight motor equipment experience;

(2) precluding an award of pre-judgment interest; and

(3) declining the use of a special master absent any disagreements as to calculations of back pay.

It is further

ORDERED that the remainder of defendants' motion for summary judgment is denied. It is further

ORDERED that plaintiffs' motion for summary judgment is granted with respect to:

(1) back pay for individually-named plaintiffs;

(2) calculation of back pay for the remaining 151 class members as set out in this order; and

(3) additional affirmative relief as set out in the order and attached appendices.

It is further

ORDERED that plaintiffs should submit a motion for attorneys' fees and costs within twenty (20) days of the date of this order, with defendants having an additional fifteen (15) days to respond.

APPENDIX A

PLAN FOR HIRING

1. The Missouri Highway and Transportation Commission shall, on February 1, 1986, and January 1 of each subsequent year thereto to and including January 1, 1990, file a report with the Court and serve a copy of same upon plaintiffs, which report shall contain the following information:

a. A breakdown of applicants for maintenance crew positions by sex, by month;

b. A breakdown of hires for maintenance crew by positions, by sex, by month, by maintenance shed;

c. A census of all employees in maintenance crew positions by name, sex, job title, and District.

2. To support such an accounting, the Highway Commission shall maintain all applications filed for maintenance crew positions and all personnel selection forms for hirees to maintenance crew positions in District 8.

3. Between the date of this order and January 1, 1990, the Highway Department in District 8 shall generate an actual pool of applicants for the maintenance job in District 8 which consists of between 37%-48% women. The Court shall review the actual applicant pool yearly and if, at the conclusion of 1988, substantial progress has not been made, further stringent measures may be imposed by the Court. If by January 1, 1990, the Court determines that these goals have been met, the Court will terminate its jurisdiction.

4. Between the date of this order and January 1, 1990, the Highway Department in District 8 shall fill between 37%-48% new vacancies for maintenance crew jobs in District 8 with women (which may include eli-

gible class claimants). The Court shall review the hire rates by sex yearly and if at the conclusion of 1988, substantial progress has not been made, further stringent measures may be imposed by the Court. If by January 1, 1990, the Court determines that these goals have been met, the Court will terminate its jurisdiction.

APPENDIX B

RECRUITMENT

1. The Highway Commission shall develop local newspaper advertisements which clearly indicate that women applicants are desired for the entry maintenance crew positions.

2. The Highway Commission shall develop a brochure to be distributed to the local high schools in the area which describes the job of maintenance person and shows photographs of men and women doing the jobs.

3. The Highway Commission shall identify the sources of women applicants in the community: women's organizations, social service agencies, etc., and shall distribute a brochure to advise them of the openings for women in these positions.

4. The Highway Commission shall post notices of maintenance crew vacancies in areas accessible to all employees.

5. For each job vacancy, the Highway Commission shall: (a) Review all active job applications for persons who have indicated they would consider a job at that location. (b) If no active female applications are on file for that location, advertise the position on local radio stations and in the newspapers before interviewing. Also, contact the Missouri Employment Security Service, and local women's groups identified earlier to advise them of openings (if class member) before a selection is made.

APPENDIX C

APPLICATION PROCESS

The following questions will be listed:

a. Will you accept a position at any location in the state? — Yes — No

b. Check each of the locations where you would accept a position, if offered. (You must be willing to move within approximately a 20-30 minute drive to work.) (List all maintenance sheds in the district and have a small map with number codes showing where each shed is located.)

c. Of the locations check [sic] in item 2, indicate, in order of preference, the top three locations at which you would prefer to work.

d. Check any of the following skills in which you have been trained.

— Operate Tractor
— Operate Backhoe
— Drive Pickup Truck
— Small Engine Repair
— Snow Plow
— Diesel Engine Repair
— Gasoline Engine Repair
— Light Equipment Operator
— Heavy Equipment Operator

e. Check any of the following skills which you now have from paid or unpaid experience.

— Operate Tractor
— Operate Backhoe
— Drive Pickup Truck
— Small Engine Repair
— Snow Plow

— Diesel Engine Repair
— Gasoline Engine Repair
— Light Equipment Operator
— Heavy Equipment Operator

f. On section for employment history, add these instructions: ALSO LIST ANY SELF-EMPLOYMENT OR PAID OR NON-PAID FARM EXPERIENCE.

APPENDIX D

INTERVIEWS AND TRAINING OF INTERVIEWERS

1. A taped or videotaped description of the job will be developed to be shown to all interviewees.

2. The interviews checklist shall be used in all interviews, that utilizes non-discriminatory, job-related criteria.

3. All discriminatory comments and references shall be eliminated from the interview.

4. No persons other than the interviewer and supervisory personnel shall be present for an interview.

5. All persons interviewing applicants for entry maintenance positions shall be given a one-day training course on conducting non-discriminatory interviews and using non-discriminatory evaluation criteria.

6. Supervisory personnel shall observe one interview per month of each interviewer for one year and evaluate the interviewer's conduct in the interview with regard to equal employment opportunity.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 86-1087/1115/1860/2252/2393/2459WM

JANE CATLETT, *et al.*,
Appellees/Cross-Appellants,

vs.

MISSOURI HIGHWAY COMMISSION, *et al.*,
Appellants/Cross-Appellees.

Appeals from the United States District Court
for the Western District of Missouri

Petitions for rehearing en banc filed by Jane Catlett, et al, and the Missouri Highway and Transportation Commission, et al, have been considered by the Court and are denied.

Petitions for rehearing by the panel are also denied.

October 23, 1987

Order entered at the Direction of the Court:

Clerk, U. S. Court of Appeals, Eighth Circuit

87-1415
No. 87-1416

In The
Supreme Court of the United States
October Term, 1987

MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION: ROBERT N. HUNTER, CHIEF ENGINEER OF THE MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION and V. B. UNSELL, DISTRICT ENGINEER FOR DISTRICT 8 OF THE MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION,

Petitioners,

v.

JANE CATLETT, PATRICIA LEEMBRUGGEN, GRACE TUTER and ADELINE KALLEMYN, Individually and on behalf of all other similarly situated,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONER MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION'S PETITION FOR WRIT OF CERTIORARI

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April 6, 1988

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or call collect (402) 342-2831

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CORRECTED STATEMENT OF THE CASE

INTRODUCTION

The Highway Department's Certiorari Petition ignores the standard of review by focusing its arguments away from the evidentiary record and the findings of the trial court. Additionally, the Highway Department's characterization of the Eighth Circuit opinion is inaccurate and misleading. Respondent therefore wishes to review the Eighth Circuit opinion in the context of the record and the findings of the trial court.

I. Trial Court Findings

The issue of intentional discrimination was first addressed by the jury under 42 U.S.C. § 1983. Petitioner quietly acknowledges in a footnote (Petition for Certiorari (hereinafter "Petition") p. 4, n. 1) that the jury found in favor of the class on the issue of whether the Highway Department engaged in a pattern and practice of intentional discrimination against women in recruitment and hiring regarding its low-skilled, entry-level job of "maintenance man." The trial court then followed with a decision under Title VII on the basis of a substantial evidentiary record, finding pervasive and purposeful sex discrimination in numerous phases of recruitment, selection and hiring for the position of maintenance man. The trial court's findings must serve as a starting point in this analysis of whether the decision of the Court of Appeals should be reviewed by this Court.

A. Recruitment

The jury found that the Highway Department intentionally discriminated against the class of women in its

recruitment policies and practices. The Judge, under Title VII, found intentional as well as non-intentional discrimination in recruitment practices. Citing the "gross and statistically significant disparity between the number of women who actually applied for maintenance positions and the number of female applicants expected to apply when compared to the relevant labor pool," the trial court found that the Highway Department's word-of-mouth recruiting practices produced an abnormally small pool of female applicants. Referring to the statistical evidence, the Court states:

> Moreover, the statistical evidence also provides support for the Plaintiffs' theory that the number of female applicants was lower due to the word-of-mouth recruiting practices of the Highway Commission. In 1975, when no women had been employed as maintenance man by District 8, there were only 9 female applicants. In 1976, when the first female was hired as a maintenance man by District 8, the number of female applicants rose to 16. In 1977, two more women were hired and 55 females applied in District 8. Similarly, in 1978, the number of women hired in District 8 reached a high of 5, and the number of female applicants rose to its highest level at 120. In 1979, no females were hired in District 8, and correspondingly, the number of female applicants dropped to 88. This parallel relationship between the number of women who were hired each year and the number of females who applied in the same year provides persuasive statistical support for the Plaintiffs' contention that the word-of-mouth recruiting practiced by District 8 had an adverse effect on the number of women who applied and were hired for the maintenance man position.

(Petitioners' Appendix, (hereinafter "Pet. App.") p. 52a).

The trial court also noted evidence of intentional recruitment discrimination citing the testimony of the Chief Engineer of the Highway Commission, Robert N. Hunter. Mr. Hunter acknowledged on cross-examination that as early as 1976, he recognized that the Commission's traditional methods of recruitment resulted in an underrepresentation of women applicants. In 1976, he documented his knowledge that local population statistics should be used as a guide in recruitment efforts. Neither he, nor his district engineer in District 8 followed through, however, by taking any meaningful steps to increase the number of female applicants. Despite the Chief Engineer's knowledge of underrepresentation, the Highway Department neither advertised in the media nor made an effort to contact womens' groups in the community to advise the public of the Commission's supposed willingness to hire women as maintenance men in District 8. (Pet. App., p. 34a).

Citing *Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977) the trial court rejected the use of applicant flow statistics to measure discrimination in this case. Noting the Highway Commission's rebuttal of allegations of discrimination in recruitment practices, the court states as follows:

> In rebuttal, the Highway Commission argues that there was no disparate impact because the Commission hired 2.6% of the female applicants between January 1, 1975 and May 31, 1980, while it hired only 2.5% of the male applicants during the same period. This argument is flawed, however, as it assumes that the applicant pool was not influenced by the Commission's recruitment and hiring process. A statistical showing of disproportionate impact need not be based on an analysis of the actual applicants, because "the

application process itself might not adequately reflect the actual potential applicant pool, since otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory." *Dothard v. Rawlinson*, 433 U.S. 321, 330, 97 S. Ct. 2720, 2727, 53 L.Ed.2d 786 (1977). See also *Donnell v. General Motors Corp.*, 576 F.2d 1292, 1298 (8th Cir. 1978). Even though the actual applicant data would indicate that there was no disproportionate impact, general population data (the first and third methods described in Green) can provide a basis for showing of disproportionate impact. *Hammond v. Intern. Ass'n of Bridge, etc.*, 637 F.2d 506, 512 n.6 (8th Cir. 1980). "This is particularly the case where there is some threat to the validity to the actual applicant data." *Id.*

(Pet. App., pp. 52a & 53a).

In this case, therefore the number of female applicants was chilled by the Highway Department's discriminatory recruitment and hiring practices.

Thus, the trial court, on the basis of well-settled law, rejects the use of applicant flow statistics as a measure of discrimination because the applicant flow data was tainted by the discrimination.

B. Relevant Labor Pool

Rejecting the actual applicant pool as a valid definition of the "available labor force", Plaintiffs' two experts used other data to construct the available labor force for the position of maintenance man for the relevant years. Plaintiffs' experts took into account the specifications and duties of "maintenance man" and the uncontroverted fact that it was a low or semi-skilled entry level job requiring no experience before hire. Both experts used data from the 1970 and 1980 census for the 11 county area compris-

ing District 8. In constructing the available labor force, the experts chose certain occupational categories to include from the census data of 1970 and 1980.

One of Plaintiffs' experts examined the actual applications filled out by women who applied and by men who were hired for maintenance man jobs. These applicants noted their paid work histories on the application form. The application showed that applicants came from varied work backgrounds including sales workers, clerical workers, craft workers, farmers, farm laborers, general laborers, and service workers. Therefore, both Plaintiffs' experts independently arrived at the conclusion that the available labor pool for maintenance man should include the above categories from the census. Although the Highway Commission claims that sales and clerical workers should be excluded because of a presumed lack of interest in the maintenance job, Plaintiffs' experts testified that between 1975 and 1980, 20% of the men who were hired and 52% of the women who applied had clerical experience; 11% of men and 26% of women had a prior history in sales. Consequently, men and women in sales and clerical jobs were included by the experts in their definition of available labor force. The Plaintiffs' experts and the trial court concluded that women comprised between 35-48% of the available labor force for the maintenance man job between 1975 and 1980.[1]

---

[1] Plaintiffs' experts adjusted the 1970 and 1980 census data for age, education and driver's license to meet the minimal requirements for hire into the job of maintenance man: an eighth grade education and an ability to operate light weight motor equipment. Contrary to Petitioners' assertions, Plaintiffs never argued or presented "unrefined" general population statistics as the relevant labor force.

The trial court found that:

> [t]he statistical evidence presented in this case clearly establishes a prima facie case of employment discrimination. The Plaintiffs' theory that the Highway Commission's word-of-mouth recruiting practices produced an abnormally small pool of female applicants is supported by the fact that there was a gross and statistically significant disparity between the number of women who actually applied for maintenance man positions and the number of female applicants expected under the moderate and conservative definitions of the labor pool. Similarly, the Plaintiffs' contention that the unregulated hiring procedure and the often hostile interview process resulted in the denial of employment opportunities to female applicants on account of their sex is illustrated by the statistically significant difference between the number of women hired for maintenance man positions and the number of females expected to be hired, and by the disparity that existed in the static work force.

(Pet. App., p. 51a).

The Petitioner mischaracterizes the trial court's holding when it states that:

> [t]he district court acknowledged that Petitioners' 'bottom line' statistics demonstrated that female applicants had a slightly better chance (2.6%) of being hired than male applicants (2.5%). Nevertheless, the court based its finding of class wide intentional discrimination on the disparity between the number of women represented and the general population and the number in Petitioners' work force.

(Petition, p. 5).

The district court made no such finding! In fact, the district court rejected the applicant flow statistics (which Petitioner characterizes as "bottom-line statistics") be-

cause the applicant flow data was tainted by the discriminatory practices of the Highway Department. Thus, the district court and presumably the jury discredited the applicant flow data as a valid measure of discrimination or lack thereof.

Furthermore, the district court did not base its finding of class wide discrimination on disparity between the number of women in the general population and the number in the Highway Department's work force. The Plaintiffs did not offer general population statistics! Rather, the Plaintiffs offered labor market data refined by job category, age and driver's license. Petitioners' insistence that the statistics involve "general population data" is misleading and inaccurate.

The Highway Department's definition of the relevant work force for the maintenance man job was rejected by the judge and the jury. Out of 40,000 potential job categories described in the Missouri Division of Employment Security code book, the Highway Department chose 28 jobs which it represented as comparable to the maintenance man job. The 28 job categories represent a work force which is over 90% male. The Highway Department argued that the people in these 28 jobs (out of 40,000 potential job categories) constituted the "available labor force" for maintenance jobs. The judge and jury, however, rejected the Highway Department' definition of the available labor pool for the maintenance man job. The fact finders simply refused to believe the Highway Department's evidence.

Finally, contrary to Petitioners' assertions (*See* Petition, p. 19), this case was indeed one in which "the trial

court was confronted with the 'inexorable zero' that would make otherwise relevant statistical comparisons meaningless." *See Teamsters v. United States*, 431 U.S. 324, 342 (1977). The first female "Maintenance man" was hired one and one-half years after Jane Catlett filed her EEOC charge! The highest number of females hired in one year was 1978, the year Catlett filed suit. The "inexorable zero" was the most persuasive statistic in the evidentiary record.

C. Anecdotal Evidence

Petitioner quietly acknowledges that the record contains anecdotal evidence of discrimination as well as statistical evidence. The Petitioner characterizes this evidence as "limited". (*See* Petitioners' Writ of Certiorari, p. 5, n. 2). In the same footnote, the Petitioner states that "[t]he Eighth Circuit did not find the few instances of discrimination to be sufficient to support an inference of intentional discrimination against the class." This characterization of the anecdotal evidence and of the Eighth Circuit's finding is totally misleading.

In fact, the Eighth Circuit stated with regard to the anecdotal evidence that:

> In this case the record of anecdotal evidence, read in the light most favorable to the class, reveals *numerous* instances suggesting Missouri was not receptive to the idea of female maintenance workers.

(Petitioners' Appendix, p. 10a) (emphasis added). The court goes on to recite at length the nature of the anecdotal evidence.

Sixteen members of the class testified regarding their individual experiences with the Highway Department officials. The class consisted of 155 women. Thus, 10% of the class testified. This evidence is hardly "limited." The anecdotal of evidence of bias brought "the cold numbers convincingly to life." *International Bh'd of Teamsters v. United States*, 431 U.S. 324, 339 (1977). During the job interviews, male interviewers probed women with questions about how their husbands would react to their working with men, how they felt about the lack of bathroom facilities and how they felt about working around people who use "curse words". Women testified that in the job interviews, their interest in the job was openly questioned despite the fact that they were present at the interview. They were told that their size would hinder their ability to handle the job; that they were more suited for secretarial jobs and that they would have to lift tractors by themselves or that the supervisor had no intention of hiring a woman. The trial court noted some of the anecdotal evidence in its findings:

> Regarding those women who were interviewed, the interviewers discouraged several female applicants by asking questions in a manner indicating that the interviewers did not believe the applicant could handle the job, while the interviewers did not question male applicants in a similar manner. During the interviews, the interviewers repeatedly rejected the assertions of female applicants that they were willing and able to perform maintenance man duties by making comments in the interview sheets such as "I am not sure that she would be satisfied although she strongly indicates that our work is what she is looking for," and "she applied for job as flag man and might not be happy with routine maintenance man duties even

though she admitted willingness to try." (Pet. App., p. 39a-40a).

The employment interviews in District 8 for the maintenance man position were conducted in settings which intimidated and discouraged female applicants, and were conducted in a manner to suggest that the females were not seriously being considered for the jobs. (Pet. App., p. 40a).

In addition, there were several instances where the interviews of female applicants in District 8 were not conducted in private rooms normally used for interviewing, but were done in open areas with large numbers of Highway employees present who would hear and react to the interview. This practice inhibited and intimidated the female applicants, and a similar procedure was not used in the interviews of male applicants in District 8. There were also instances where the interviewers tried to discourage female applicants by suggesting that the applicant's husband would become jealous if the applicant had to spend the night working on the road in emergencies with male maintenance men, or by suggesting that the female applicant would be offended by the language of the male maintenance men. (Pet. App., p. 41a).

In a similar vein, female applicants for the maintenance positions in District 8 were reluctant to attend interviews because of telephone calls from interviewers who attempted to discourage the applicants by emphasizing the negative aspects of the job and by advising the applicants that another person was likely to be hired for the position. There were instances where hiring officials in District 8 encouraged female applicants to pursue other jobs outside the Highway Commission. (Pet. App., p. 41a).

In addition to the oral testimony, the record was replete with documentary evidence showing interviewers' recorded comments about the women they interviewed. The trial court found:

> The fact that female applicants in District 8 were not given serious consideration for employment is demonstrated by comments made by interviewers on the interview sheets regarding the physical attractiveness of female applicants, and by undue emphasis given by interviewers to height and weight of female applicants and failing to hire them. Interviewers attempted to discourage female applicants by telling the applicants that they were not strong enough or built right for the job. One interviewer disqualified female applicants who were "too feminine."

(Pet. App., p. 41a-42a).

Thus, the documentary, as well as anecdotal evidence, enhanced the statistical evidence, sustaining Plaintiffs' burden of proof.

The Petitioners falsely represent that "the evidence was uncontroverted, that with respect to those persons who actually applied, the Commission had not discriminated" (Petition, p. 19) is false. In fact, the evidence was and the trial court concluded that:

> In addition to a substantial and convincing amount of revelant statistical evidence, Plaintiffs have enhanced the statistics with direct evidence that the hiring officials in District 8 intentionally discriminated against women as part of a regular pattern in practice. This evidence includes the consistent use of interviews by hiring officials *to discourage and intimidate female applicants*, the refusal on the part of the Highway Commission to promulgate objective guidelines to correct a hiring process that was known by the Commission to be discriminatory, and the purposeful failure on the part of the Commission to change its word-of-mouth recruiting policy that generated a disproportionately low number of female applicants. This evidence of discriminatory intent removes any ques-

> tion that the disparities established by the statistics arose merely as a matter of chance.

(Pet. App., p. 53a-54a) (emphasis added). The court further added:

> In light of the evidence demonstrating a pattern of discrimination against female applicants in District 8, this Court finds that the Commission's knowledge that the promulgation of guidelines was necessary to avoid discriminatory results, coupled with its failure to regulate the hiring process in District 8, constituted a prima facie showing of intentional employment discrimination. The Commission has not rebutted the Plaintiffs' prima facie showing . . . Moreover, . . . the Court concludes that the Plaintiffs have established by a preponderance of the evidence that the unregulated hiring process used by District 8 constituted a pattern in practice of intentional discrimination which denied the Plaintiffs employment opportunities on account of their sex.

(Pet. App., p. 58a).

———o———

REASONS FOR NOT GRANTING THE WRIT

The Highway Department, in challenging the liability determination, limits its Petition for Writ of Certiorari to the Title VII issues presented in this case. (Petition, p. 4, n. 1). The present inquiry therefore reaches no further than Rule 52a which reads in part as follows:

> Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous. . . .

Under Title VII, the question of intentional discrimination under Section 703(h) is a pure question of fact subject to

the "clearly erroneous standard" of Rule 52a. *Pullman Standard v. Swint,* 456 U.S. 273, 287 n. 16 (1982).

The Highway Department's Certiorari Petition ignores the standard of review by focusing its arguments away from the record and by mischaracterizing the Eighth Circuit's holdings.

I. THE EIGHTH CIRCUIT'S HOLDING BELOW ON THE ISSUE OF LIABILITY TO THE CLASS RAISES NO IMPORTANT ISSUES OF FEDERAL LAW WHICH THIS COURT HAS NOT ALREADY RESOLVED.

Petitioner states:

> The Eighth Circuit nevertheless held, solely on the basis of *Teal* (referring to *Connecticut v. Teal*) that proof that applicants were treated equally at the bottom-line was no defense to a claim that the class of applicants and non-applicants (considered together) were subject to disparate treatment.

(Petition, p. 12). This was not the holding of the Eighth Circuit. The Eighth Circuit Court did not reject the defense that the Highway Department hired an equal percentage of female applicants as male applicants. Rather, it was the factfinders who rejected this defense: the jury under 42 U.S.C. § 1983 and the judge under Title VII.

The Petitioner further characterizes as a "holding" the Eighth Circuit's dismissal of the use of actual applicant flow statistics in this case. The Eighth Circuit states:

> Furthermore, Missouri cannot shield itself from liability by pointing out that it hired 2.6% of female applicants (8 of 312) and only 2.5% of male main-

> tenance applicants (89 of 3,566). Victims of a discriminatory policy cannot be told that they have not been wronged because other females have been hired. *See Connecticut v. Teal*, 457 U.S. 440, 455 (1982); *See also*, e.g., *Craik*, 731 F.2d at 474 (males and females were selected at equal rates but no female ever prevailed when another candidate was male). While the equal hiring rate constituted relevant evidence, See *Teal*, 457 U.S. at 454, it did not entitle Missouri to judgment as a matter of law. The jury and court were free to weigh the inference of non-discrimination arising from the hiring rate against the inference of discrimination arising from the class' anecdotal and statistical evidence.
>
> This evidence, viewed in its totality, was sufficient to support the jury's verdict and the court's conclusion that Missouri, in hiring maintenance workers, engaged in a pattern or practice of discrimination against women. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 573-76 (1985) ....

(Pet. App., pp. 12a-13a).

This statement by the Eighth Circuit cannot be interpreted as a "holding" that the "bottom-line" defense is inapplicable in a class action case. The Eighth Circuit's reference to *Connecticut v. Teal* was merely a reference to the principle that equal hiring rates constitute relevant evidence. The court does not hold, as the Highway Department states, that the "bottom-line" defense is not an "answer" to a claim of class wide as opposed to individual discrimination. The discussion of *Teal* occurred in the context of the Eighth Circuit's discussion of the

standard of review: "While the equal hiring rate constituted relevant evidence, *see Teal*, 457 U.S. at 454, it did not entitle Missouri to judgment as a matter of law." (Pet. App., p. 13a).

Petitioners gloss over the standard of review which binds the Eighth Circuit under Rule 52. All the Eighth Circuit is saying here is that the jury and the judge were entitled to weigh the equal hiring rate statistics along with the other evidence and to reject it as a valid measure of discrimination. The equal hiring rate evidence was not excluded from the trial. The trial court allowed it into the record along with the other statsistics offered by the parties. The Court of Appeals merely noted that the equal hiring rates do not entitle Missouri to summary judgment on the issue of liability. The Court of Appeals does not extend *Teal* to class actions. Rather, the Court of Appeals discusses *Teal* only in the context of a review of the substantiality of the evidence of the record and only in the context of whether the trial court's finding of liability was "clearly erroneous".

The Highway Department says that the Eighth Circuit "rejected its defense based on actual hiring statistics." The Eighth Circuit did not reject the defense. The jury and the trial court rejected the defense, as they were entitled to do. Thus, Petitioners' arguments for review evaporate when the Eighth Circuit's decision is examined in the proper context.

II. THE HOLDING BELOW DOES NOT RAISE THE QUESTION OF WHETHER A STATISTICAL DISPARITY BETWEEN THE PERCENTAGE OF WOMEN IN AN EMPLOYER'S WORK FORCE AND THE PERCENTAGE OF WOMEN IN THE GENERAL POPULATION IS SUFFICIENT TO SHIFT THE BURDEN TO THE EMPLOYER TO PROVE DIRECTLY THAT DISPARITY RESULTS FROM LACK OF INTEREST OR QUALIFICATIONS.

The Petitioners state:

> Under the decision below, if a Title VII class action plaintiff is able to demonstrate that an employer does not hire or maintain a work force that mirrors the representation of women in the population, the burden shifts to the employer to demonstrate, by "direct evidence," that such a "disparity" is the result of a lack of qualifications or interest, or both, on the part of female members of the class. The court's requirement that the employer produce "direct evidence of lack of interest or qualifications strongly suggests that statistical evidence demonstrating lack of interest—a traditional method of countering plaintiffs' statistical evidence is inadequate.

(Petition, p. 8).

The Court of Appeals did not "require" direct evidence of lack of interest. The court's reference to the Highway Department's failure to adduce direct evidence is made in the context of a discussion of the factfinders' obvious rejection of the Highway Department's statistical evidence of lack of interest. The trial court permitted the Highway Department to adduce certain statistical evidence in support of its argument that women in general do not apply for maintenance man jobs because they have no interest in the jobs. This evidence was consid-

ered by the jury under 42 U.S.C. § 1983 and by the judge under Title VII. Since the jury and judge explicitly found that the Highway Department discriminated against women in recruitment practices, they rejected the Highway Department's evidence of lack of interest. Given this rejection, the Eighth Circuit, in reviewing whether the evidence was sufficient to support the judgment, merely noted that the Highway Department put on no direct evidence to overcome the unpersuasive statistical evidence of lack of interest.

Throughout the Petition for Certiorari, the Petitioners repeatedly misrepresent to this Court that the Plaintiffs' relevant labor pool was nothing more than unrefined general population statistics. As previously shown, Plaintiffs' potential labor pool consisted of highly refined labor market statistics derived from certain occupational categories reported in the 1970 and 1980 census. The Petitioners cavalierly characterize this refined labor data as "general" population statistics. (*See, e.g.*, Petition, pp. 5, 9).

Petitioners assert that they were "not permitted" to rebut Plaintiffs' evidence of the relevant labor force for maintenance man jobs. (*See* Petition, p. 19). To the contrary, however, the Highway Department was permitted by the trial court to adduce evidence to rebut Plaintiffs' statistics.

In fact, the Highway Department offered a great deal of statistical evidence in support of its argument that women as a general rule are not interested in the entry level maintenance job. The evidence consisted of Division of Employment Security data collected by the Missouri

Division of Employment Security in the course of processing applications for unemployment insurance. The Highway Department's evidence was that out of some 40,000 job categories, there are 28 which are comparable to the maintenance position and very few women, when asked by the Division of Employment Security which jobs they are interested in, volunteer any of the 28 jobs. The Highway Department did not adduce any *direct* evidence of lack of interest by women in the maintenance job.

The Eighth Circuit's discussion of the Highway Department's "lack of interest" evidence and arguments is again in the context of a review of the sufficiency of the evidence under the clearly erroneous rule. All the Eighth Circuit says is that the jury and the court were entitled to reject the Highway Department's "lack of interest" defense, as fact finders. The trial court did not exclude the Highway Department's "lack of interest" evidence. Obviously, the judge and the jury as fact finders did not find the evidence persuasive. The Petitioners' argument suggests that the Eighth Circuit should have, as a matter of law, reversed the liability finding because the jury was allowed to consider the Plaintiffs' evidence of relevant labor force based upon refined census labor market data. Obviously, there is no law to support such an exclusion of evidence.

The fact that the maintenance position is a traditionally male-dominated job category does not render Plaintiffs' evidence inadmissible as a matter of law. Plaintiffs' evidence of the relevant labor market for the maintenance job consisted of refined labor market data taken from the census of 1970 and 1980. Unlike the facts of *Mazus*

v. Department of Transp., 629 F.2d 870, 875 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981), cited by Petitioners in their Argument for Review (Pet., p. 17), Plaintiffs in this case showed that "inside" workers such as clerical and sales workers were interested in the maintenance job.

The factfinders, therefore, were entitled to reject the Highway Department's claim that sales workers and clerical workers should not be included in the definition of the relevant labor pool for the maintenance position. Petitioners' attack on inclusion of these job categories in the relevant labor market is based upon an argument that in sex discrimination cases involving a job which has been traditionally filled by males, Plaintiffs may not adduce evidence that the relevant labor market may include something other than the actual applicant pool. As a matter of law, of course, this argument is indefensible. This is particularly true in a case focussing on a low skilled entry level position such as maintenance man which required only an eighth grade education and an ability to operate light weight motor equipment. Although Plaintiffs did not use "general population statistics", this Court long ago approved the use of general census statistics as a method of defining the relevant labor pool for jobs of low skill. *See Teamsters v. United States*, 431 U.S. 324 (1977) and *Johnson v. Transportation Agency*, 107 S.Ct. 1442 (1987). Furthermore, general population statistics, or in this case refined labor market statistics based upon census data, may be preferable as a definition of the relevant labor pool when the actual applicant flow data is tainted. As this Court stated in *Dothard v. Rawlinson*:

> There is no requirement, however, that a statistical showing of disproportionate impact must always be based on analysis of the characteristics of actual applicants. The application process itself might not adequately reflect the actual potential applicant pool, since otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory.

Dothard v. Rawlinson, 433 U.S. 321, 330 (1977) (citation omitted). In this case, the Plaintiffs showed that the applicant pool was tainted by the Highway Department's discriminatory recruitment and hiring practices. Plaintiffs persuaded the court and the jury that the relevant labor pool for the job of maintenance man should not be defined as the actual applicant pool. Rather, the relevant labor pool consisted of women and men in the actual labor force in certain job categories, who held a driver's license and who were between the ages of 18 and 70. In effect, the Petitioners argue that as a matter of law, the judge and the jury were not permitted to consider this evidence because this is a sex discrimination case involving a job category which has traditionally been occupied by an all male work force.

The Petitioners state that:

> In a class action disparate treatment case alleging sexual discrimination in hiring, particularly for non-traditional, semi-skilled jobs, as employer must be allowed to rebut the Plaintiffs' general work force statistics with more refined and more probative statistical comparisons focusing on the pool of qualified and interested candidates.

(Petition, p. 18). The Highway Department was allowed to rebut the Plaintiffs' evidence! Petitioners would have

this Court believe that the evidence of the Highway Department had been excluded! Rather, it was included and it was weighed by the fact finders and rejected. The Highway Department was not deprived of a defense. The Petitioners' arguments for review can be distilled into one simple, absurd proposition: in a sex discrimination class action involving a job which has been historically dominated by men, plaintiffs may not adduce evidence of a potential applicant pool but must instead be confined to evidence of the actual applicant pool in defining the relevant labor market for the job in question. The proposition is absurd. The law in support of it is nonexistent.

The Petitioners' argument for review is based upon a mischaracterization of the Eighth Circuit's holding on the issue of liability. All the Eighth Circuit held was that as a matter of law, Plaintiffs' statistical and anecdotal evidence was relevant and sufficient to support the court's decision.

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No. 87-1415

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION; ROBERT N. HUNTER, CHIEF ENGINEER OF THE MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION AND V.B. UNSELL, DISTRICT ENGINEER FOR DISTRICT 8 OF THE MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION,

Petitioners,

v.

JANE CATLETT, PATRICIA LEEMBRUGGEN, GRACE TUTER AND ADELINE KALLEMYN, Individually and on behalf of all others similarly situated,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondents, in their opposition, characterize both questions presented in the petition as "fact-bound" challenges to the findings of the district court. Respondents' characterization of the petition is simply wrong. Petitioners seek review in this Court of two important and recurring questions of federal law, which were decided by the court of appeals in a way that in one instance significantly expands and in the other contrasts with the

analyses adopted by this Court and followed by other courts of appeals.

1. It is important to remember that in this case alleging *classwide* disparate treatment of female applicants, petitioners established by undisputed evidence that female applicants, as a class, were slightly more likely to be hired than male applicants. Pet. App. 12a-13a. The court of appeals squarely rejected petitioners' argument that the district court erred in not finding such statistical evidence to be a defense to a claim of classwide discrimination against female applicants. In doing so, the court of appeals relied upon this Court's opinion in *Connecticut* v. *Teal*, 457 U.S. 440 (1982), which held that such "bottom line" statistics are not a defense to an *individual* claim of disparate treatment. Thus, petitioners stated that "[t]he instant case raises the important issue, left undecided in *Teal*, whether the 'bottom line' defense is an 'answer' to a claim of classwide—as opposed to individual—discrimination." Pet. 12.

Respondents attempt to divert attention from the clear question presented by the holding of the court of appeals by mischaracterizing petitioners' argument as a request to have this Court "reweigh" the evidence of classwide discrimination. Opp. 14-15. "All the Eighth Circuit is saying here is that the jury and the judge were entitled to weigh the equal hiring rate statistics along with the other evidence and to reject it as a valid measure of discrimination." Opp. 15. But petitioners do not want the evidence "reweighed." In fact, it is petitioners' clearly stated position that—as a matter of law—the evidence of classwide discrimination should not have been "weighed" at all. By rejecting the "bottom line" defense to classwide claims, the court of appeals has established a legal standard under which the employer's only statistical defense to a classwide disparate treatment claim is to

show that his hiring mirrors gender representation in the community. See Pet. 12.[1]

The fact that the court of appeals decided a significant legal question is implicitly recognized in the respondents' summary of the issues: "[t]he jury and the trial court rejected the [bottom line] defense, as they were entitled to do." Opp. 15. If, as petitioners have argued, this Court's reasoning regarding the use of "bottom line" statistics cannot be properly extended from individual claims of disparate impact (as was the case in *Teal*) to classwide claims of disparate treatment (as was the case here), then the court of appeals erred—as a matter of law—in holding that the trial court was "entitled to" "reject" the defense. Moreover, that holding—that the decision in *Teal* should be extended to reach such a result—represents a substantial development in the analysis of classwide disparate treatment claims under Title VII that warrants review by this Court. See Pet. 12-13.

2. On the second question presented, petitioners argued that the court of appeals impermissibly shifted to employers the burden to produce "direct evidence" of lack of interest or qualifications among women, rather than requiring the district court to analyze the question

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[1] Respondents' mischaracterization of the Petition as seeking review of a "fact-bound" question is belied by their own statements. Respondents argue:

> The Court of Appeals does not extend *Teal* to class actions. Rather, the Court of Appeals discusses Teal only in the context of a review of the substantiality of the evidence in the record . . . .

Opp. 15. In the first place, there is no reason in logic or law that "extend[ing] *Teal* to class actions" and engaging in a review of the "substantiality of the evidence in the record" are mutually exclusive undertakings, as respondents seem to suggest. In fact, respondents' characterization of the court of appeals' holding—that the district court was "entitled" to "reject[]" the bottom line defense (Opp. 15)—is a concession by them that the holding below constituted an extension of *Teal* to class actions.

of statistical disparity on the basis of refined labor pool statistics that take interest and qualifications into account. In effect, the court of appeals affirmed an analysis of statistical disparity under which the court need not determine which definition of the labor pool leads to the proper statistical comparison, but may instead leave the factfinder free to "weigh" without any constraints the competing inferences. Pet. App. 31a. In response to petitioners' argument that the respondents' labor pool was impermissibly broad (because of a failure to take into account interest and qualifications), the court held that petitioners "bore the burden" of producing "direct evidence" on interest and qualifications. As petitioners demonstrated, such a holding conflicts with this Court's analyses of the use of statistical evidence in *Teamsters* v. *United States*, 431 U.S. 324 (1977) and *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977).

Respondents for their part do not even *mention Hazelwood* and certainly make no serious effort to reconcile this Court's analysis in that case with the reasoning below. Instead, respondents attempt to avoid addressing the issue presented by mischaracterizing the court of appeals' decision in terms of "whether the evidence was sufficient to support the judgment . . . ." Opp. 17. Respondents state: "All the Eighth Circuit held was that as a matter of law, Plaintiffs' . . . evidence was relevant and sufficient to support the court's decision." Opp. 21. If that were the case, then petitioners would not have brought this question before the Court. However, it is clear that the court of appeals did more than merely approve the district court's finding of facts.

The court of appeals' opinion demonstrates that the court undertook the legal analysis described by the petitioners. The court of appeals adopted the respondents' definition of the labor pool, as reflected in its statement that females constituted 48% of the relevant work force.

Pet. App. 12a. In response to the argument that such a labor pool "failed to consider the actual interest of otherwise qualified men and women," (Pet. App. 12a) the court of appeals stated that

> [petitioners] bore the burden of introducing evidence to show that this failure was significant . . . . [Petitioners], however, introduced no direct evidence demonstrating that a lesser interest in highway maintenance work on the part of females accounted for the disparity between the percentage of such positions held by females and the percentage of females in the work force defined by the class.

Pet. App. 12a. Thus, the court of appeals held that (1) respondents' "general population" statistics accurately measured the appropriate work force; (2) petitioners' refined work force statistics failed to satisfy the "burden" of rebutting respondents' statistics; and (3) a lack of interest among the relevant work force may be shown only by "direct evidence" from petitioners.

Instead of offering an alternative explanation of the court of appeals' opinion, or support for the court of appeals' holding, respondents focus exclusively on the opinion of the district court.[2] However, as noted above, the error in the court of appeals' legal analysis has nothing to do with the sufficiency of the evidence.

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[2] See Opp. 16 ("The trial court permitted the [petitioners] to adduce certain statistical evidence . . ."); Opp. 17 ("Since the [district court] explicitly found that [petitioners] discriminated against women in recruitment practices, they rejected the [petitioners'] evidence of lack of interest"); Opp. 18 ("Obviously, the judge and the jury as factfinders did not find the evidence persuasive"); Opp. 19 ("The factfinders . . . were entitled to reject the [petitioners'] claim that [certain workers] should not be included in the definition of the relevant labor pool"). Virtually the only statement relating to the court of appeals is respondents' repeated refrain that the evidence was sufficient under the "clearly erroneous rule." Opp. 17, 18, 19.

Respondents also argue that petitioners "misrepresent" their "refined" labor pool statistics as general population statistics. In fact, petitioners—unlike respondents—describe the court's definition of the supposedly relevant labor pool in detail. See Pet. 5-6 & n.7. Under that "refined" labor pool—which under its "conservative" definition encompassed all females between 18 and 70 years of age with a drivers license (except for managerial, professional, technical and clerical workers)—the court of appeals concluded that "females constituted up to forty-eight percent" of the relevant work force for maintenance workers. Thus, there is no misrepresentation, or error, in the claim that "the definition employed is indistinguishable, *as a practical matter*, from the general population." Pet. 8, n.7 (emphasis added).

Finally, respondents simply are incorrect in their characterization of petitioners' argument. Respondents state that "Petitioners assert that they were '*not permitted*' to rebut Plaintiffs' evidence . . ." Opp. 17. In fact, a complete quotation of the statement at issue shows that petitioners stated that "if employers are *not permitted* to rebut general work force statistics in this manner [*i.e.*, with more refined work force statistics], Title VII effectively imposes liability on all public employers whose work force does not mirror the racial or sexual composition of the general population." Thus, petitioners never complained that their evidence was not admitted; petitioners' argument always has been that their evidence was improperly ignored. That issue is a purely legal question which merits review by this Court.[3]

* * * * *

[3] The existence of the limited "anecdotal" evidence cited by respondents, Opp. 8-11, does not render the issues regarding the statistical evidence unworthy of review. The anecdotal evidence was based primarily on the testimony of the four named plaintiffs, who were not found to have been victims of discrimination. The Eighth Circuit did not find the few remaining instances of dis-

In sum, the court of appeals' reliance on "general population" data, coupled with the rejection of petitioners' more refined work force statistics and "bottom line" defense, deprives Title VII defendants of any meaningful defense to classwide disparate treatment claims where actual hiring does not mirror minority representation in the community. As such, the Eighth Circuit's decision expands the potential liability of employers significantly beyond what Congress intended and what this Court has allowed to date. Review of the decision below is necessary to clarify the proper use of statistical evidence and burdens of proof in Title VII disparate treatment cases alleging sex discrimination in employment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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crimination to be sufficient to support an inference of intentional discrimination against the class. See Pet. 5-6, n.2.